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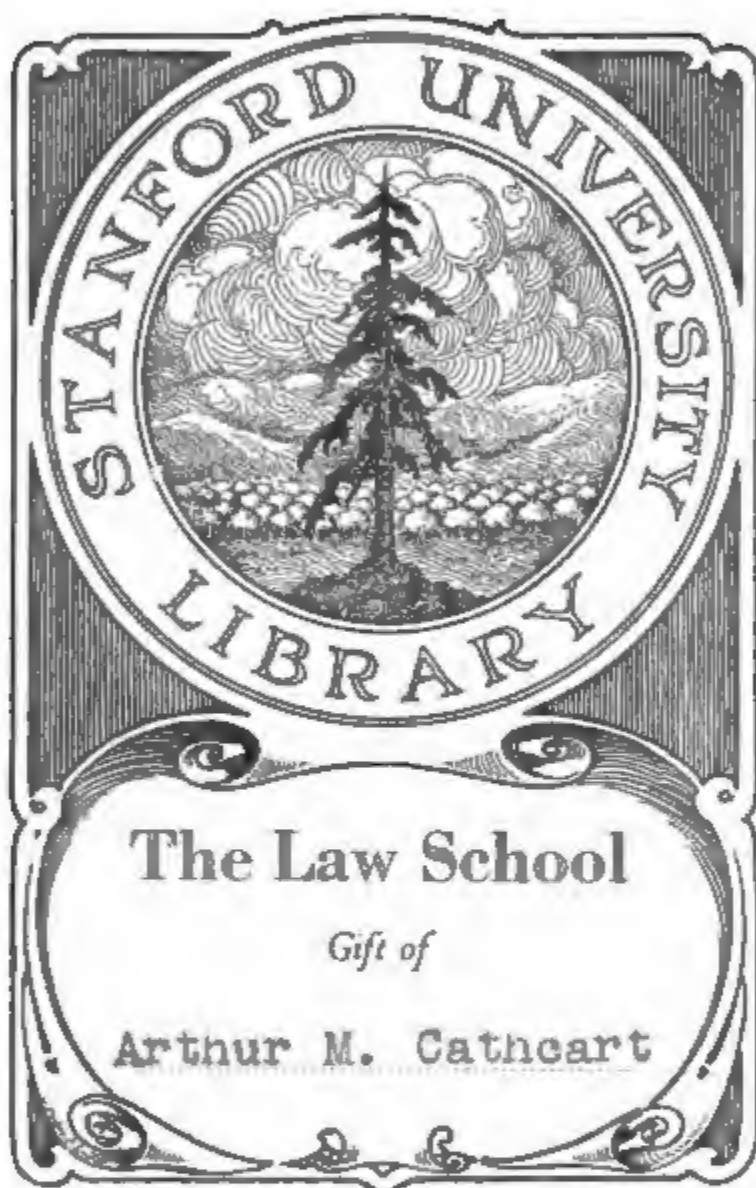
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CASES ON TORTS

SECOND EDITION

Good copy.
FRANK A. ERWIN

PROFESSOR OF LAW IN NEW YORK UNIVERSITY

G. M.

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CASES ON TORTS.

ASSAULT AND BATTERY.

ASSAULT.

TUBERVILLE V. SAVAGE.

(1 Modern Reports, 3 [Case 13].—1669.)

ACTION of *assault, battery, and wounding*.

The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "*If it were not assize-time, I would not take such language from you.*" The question was, If that were an assault? The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and *the intention* as well as *the act* makes an assault. Therefore, if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no *intention* to assault; but if one, intending to assault, strike *at* another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

MORTIN V. SHOPPEE.

(3 Carrington and Payne, 373.—1828.)

ASSAULT. Plea, General issue. The plaintiff was walking along a footpath by the road-side at Hillingdon, and the defendant, who was on horseback, rode after him at a quick pace. The plaintiff ran away, and got into his own garden; when the defendant rode up to the garden gate (the plaintiff then being in the garden about three yards from him), and, shaking his whip, said, "Come out, and I will lick you before your own servants."

LORD TENDERDEN, C. J. If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

Verdict for the plaintiff. Damages, 40s.

STEPHENS V. MYERS.

(4 Carrington & Payne, 349.—1830.)

ASSAULT. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea—not guilty.

It appeared, that the plaintiff was acting as chairman, at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion, which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made, that he should be turned out, which was carried by a very large majority. Upon this, the defendant said, he would rather pull the chairman out of the chair, than be turned out of the room; and immediately advanced with his fist clenched toward the chairman, but was stopped by the church-warden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said, that it seemed to them that he was advancing with an intention to strike the chairman.

TINDAL, C. J., in his summing up, said:—It is not every threat, when there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped; then, though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff—Damages, 1 s.

BEACH v. HANCOCK.

(27 New Hampshire, 223.—1853.)

TRESPASS for an assault.

Plaintiff and defendant being engaged in an angry altercation, the latter stepped into his office and got a gun, which he pointed in a threatening manner at plaintiff, standing three or four rods away. He snapped the gun, which was not loaded, two or three times, but the plaintiff did not know that it was not loaded.

The court instructed the jury that an assault had been committed, and that in assessing damages it was their duty to consider the effect trivial damages would have in encouraging disturbances of the peace. The defendant excepted to such instructions.

By Court, GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant, to show that the ruling of the court was incorrect. Among them is the case of *Regina v. Baker*, 1 Car. & Kir. 254. In that case the prisoner was indicted under the statute of 7 Wm. IV and 1 Vict. c. 85, for attempting to discharge a loaded pistol. ROLFE, B., told the jury that they must consider whether the pistol was in such a state of loading that under ordinary circumstances it would have gone off, and that the statute under which the prisoner was indicted would then apply. He says, also: "If presenting a pistol at a person, and pulling the trigger of it, be an assault at all, certainly in the case where the pistol is loaded, it must be taken to be an attempt to discharge the pistol with intent of doing some bodily injury."

From the manner in which this statement is made, the opinion of the court must be inferred to be, that presenting an unloaded pistol is an assault. There is nothing in the case favorable to the defendant. The statute referred to relates to loaded arms.

The case of *Regina v. James*, 1 Car. & Kir. 529, was an indictment for attempting to discharge a loaded rifle. It was shown that the priming was so damp that it would not go off. TINDAL, C. J., said: "I am of opinion that this was not a loaded arm within the statute of 1 Vict. c. 85; and that the prisoner can neither be convicted of the felony nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged."

The reason why the prisoner could not be convicted of the assault is given in the case of *Regina v. St. George*, 9 Car. & P. 483, where it was held that on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged, and on such an indictment the prisoner

ought only to be convicted of an assault which is involved in the felony itself.

In this case, PARKE, B., said: "If a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."

So if a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life if the pistol had gone off, *seem* that this is an assault, even though the pistol were in fact not loaded. *Regina v. St. George, supra.*

In the case of *Blake v. Barnard*, 9 Car. & P. 626, which was trespass for an assault and false imprisonment, the declaration alleged that the pistol was loaded with gunpowder, ball, and shot, and it was held that it was incumbent on the plaintiff to make that out. Lord ABINGER then says, "If the pistol was not loaded, it would be no assault," and the prisoner would be entitled to an acquittal, which was undoubtedly correct under that declaration, for the variance. *Regina v. Oxford, id.* 525. One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security, society loses most of its value, peace, and order; and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace, damages incommensurate with the injury sustained, would certainly lead the ill-disposed to consider an assault as a thing that might be committed with impunity. But at all events, it was proper for the jury to consider whether such a result would or would not be produced. *Flanders v. Colby*, 28 N. H. 34.

Judgment on the verdict ¹

¹In accord, *Chapman v. State*, 78 Ala. 463; *State v. Sears*, 86 Mo. 169; *State v. Godfrey*, 17 Or. 300; *McKay v. State*, 44 Tex. 43. *Contra*, *State v. Shepard*, 10 Ia. 129; *Com. v. White*, 110 Mass. 409.

Criticising the case of *Chapman v. State, supra*, on its criminal side, Mr. Bishop (II. New Crim. Law, 8th ed., § 32) says: "Any definition involving the idea that there is no assault without 'the present means of carrying the intent into effect'—that is, committing the battery—is absolutely foreign to our common law. It

MITCHELL v. ROCHESTER RAILWAY CO.¹

(151 New York, 107.—1896.)

APPEAL from an order of the General Term of the Supreme Court, which affirmed an order of the Special Term setting aside a nonsuit and granting a new trial, in an action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant.

would make it not an assault for one to pull the trigger of a loaded and pointed gun where the cap proved defective, or where a stronger man pushed the gun aside before the charge was ignited, or where an officer seized his arm just in time to save the life of the intended victim, or where he fell in a fit an instant too soon; in no one of which supposed cases would any lawyer doubt that there was an assault. Of course, to constitute any crime, there must be a sufficient act and a sufficient evil intent, and authority has settled it that words alone are not adequate in act. And authority has equally settled it that a force which has traveled so far toward a battery as to be worthy of the law's recognition, which is the common case of assault short of a battery, does not cease to be indictable though the wrongdoer finds himself incapable, as ordinarily in such cases he does, of accomplishing what he meant; in other words, where he has not 'the present means of carrying the intent into effect.'"

Criminal liability, in such a case, has been well stated by Wells, J., in *Commonwealth v. White*, 110 Mass. 407, 409: "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

¹In case of pure assault, or mere *attempt* to do bodily harm, without physical contact, the law has allowed recovery, on the theory that every one has a right to live without being put in fear of personal harm. (*Martin v. Shoppee*, 3 Carr. & P. 373; *Stephens v. Myers*, 4 Carr. & P. 349; *Beach v. Hancock*, 27 N. H. 223.) This is in fact allowing recovery for mental suffering, unaccompanied by bodily injury; for fear of harm, short of actual contact. When, however, fear and its consequences are the result of a *negligent*, instead of a *wilful* act, the tendency of the decisions is to deny recovery, unless physical injury precedes the mental suffering. Theoretically, this cannot satisfactorily be explained. The courts, in applying the rule of proximate cause, hold that mental suffering, unaccompanied by bodily injury, is too remote from the alleged wrong, and are seemingly influenced so to hold by the consideration that to allow such claims would open the flood-gates of litigation and pave the way for much deception, because "mental suffering is so largely subjective, so peculiarly dependent upon the mental traits and idiosyncracies of the alleged sufferer, and so peculiarly incapable of demonstration to a third person." (I. University Law Rev. 322.) The rule thus existing seems to rest rather on policy and convenience than on sound reason. The rule of proximate cause is simple and clear; the difficulty lies in its application; but the difficulty of applying a rule is poor argument against its application. See I. University Law Rev. 10; III. id. 130; VII. Harvard Law Rev. 304; X. id. 239; opinion by Kennedy, J., in *Dulieu v. White & Sons*, 2 K. B. 669 (1901); Erwin's Summary of Torts, 2d ed., pp. 11-15.

MARTIN, J. The facts in this case are few and may be briefly stated. On the first day of April, 1891, the plaintiff was standing upon a cross-walk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped.

She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright as there was no immediate personal injury. (*Lehman v. Brooklyn City R. R. Co.*, 47 Hun, 355; *Victorian Railways Commissioners v. Coultas*, L. R. [13 Appeal Cases] 222; *Ewing v. P., C. & St. L. Ry. Co.*, 147 Penn. St. 40.) The learned counsel for the respondent in his brief very properly stated that, "The consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile v. Texas & Pacific R. Co.* (23 Lawyer's Rep. 774); *Joch v. Dankwardt* (85 Ill. 331); *Canning v. Inhabitants of Williamstown* (1 Cush. 451); *Western Union Tel. Co. v. Wood* (57 Fed. Rep. 471); *Renner v. Canfield* (36 Minn. 90); *Allsop v. Allsop* (5 Hurl. & Nor. [N. S.] 534); *Johnson v. Wells, Fargo & Co.* (6 Nev. 224); *Wyman v. Leavitt* (71 Me. 227).

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an

action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it.

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.

Moreover, it cannot properly be said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery in this action.

These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

The orders of the General and Special Terms should be reversed, and the order of the Trial Term granting a nonsuit affirmed, with costs.

All concur, except HAIGHT, J., not sitting, and VANN, J., not voting.

Ordered accordingly.

SPADE v. LYNN & BOSTON R. R. Co.

(168 Massachusetts, 285.—1897.)

ACTION to recover for personal injuries alleged to have been sustained through the negligence of the defendant. The declaration alleged that on February 16, 1895, while the plaintiff was a passenger in the defendant's car, and in the exercise of due care, "one of the defendant's agents or servants, in attempting to remove from said car a certain person

claimed and alleged by said defendant's agent to be noisy, turbulent, and unfit to remain as a passenger in said car, conducted himself with such carelessness, negligence, and with the use of such unnecessary force, that said agent and servant, acting thus negligently, created a disorder, disturbance, and quarrel in said car, and thereby frightened the plaintiff and subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated and suffered, and has continued to suffer, great mental and physical pain and anguish, and has been put to great expense."

At the trial, the plaintiff testified that in the removal of the disorderly person, an intoxicated person, standing directly in front of her, "lurched over so it kind of pushed me back against the car."

"Q. Your body was not injured in any way by contact with this man? A. Oh, no, I was not injured. There were not any marks on me, anything like that.

"Q. You suffered no pain from this man touching you? A. No, not any injury from that.

"Q. What was the cause of this man's touching you, the one that lurched forward? A. When the conductor jumped and grabbed this man that I told about, on the opposite side of the car, that made a commotion, and as he twitched him it pushed this other man over on to me."

Verdict for plaintiff. The defendant alleged exceptions.

ALLEN, J. This case presents a question which has not heretofore been determined in this Commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury; but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Boston & Maine Railroad*, 163 Mass. 484, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even

although the harm consists mainly of nervous shock. It was not therefore a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or non-liability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may and sometimes does produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem therefore that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if in its general application it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer

must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practical, arrangements may be made accordingly, and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 H. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and implied. *Lombard v. Lennox*, 155 Mass. 70; *White v. Dresser*, 135 Mass. 150; *Fillebrown v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 131; *Milwaukee & St. Paul Railway v. Kellogg*, 94 U. S. 469, 475; *Wyman v. Leavitt*, 71 Maine, 227; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11; *Hampton v. Jones*, 58 Iowa, 317; *Renner v. Canfield*, 36 Minn. 90; *Lynch v. Knight*, 9 H. L. Cas. 577, 591, 595, 598; *The Notting Hill*, 9 P. D. 105; *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122.

The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met.

These views are supported by the following decisions: *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222; *Mitchell v. Rochester Railway*, 151 N. Y. 107; *Ewing v. Pittsburg, Cincinnati, Chicago & St. Louis Railway*, 147 Penn. St. 40; *Haile v. Texas & Pacific Railway*, 60 Fed. Rep. 557.

In the following cases, a different view was taken: *Bell v. Great Northern Railway*, 26 L. R. (Ir.) 428; *Purcell v. St. Paul City Railway*, 48 Minn. 134; *Fitzpatrick v. Great Western Railway*, 12 U. C. Q. B. 645; see also Beven, Negligence, 77 *et seq.*

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennox*, and *Fillebrown v. Hoar*, already cited. *Meagher v. Driscoll*, 99 Mass. 281.

In the present case, no such considerations entered into the rulings or were presented by the facts. The entry therefore must be,

Exceptions sustained.

PURCELL V. ST. PAUL CITY RY. CO.

(48 Minnesota, 134.—1892.)

APPEAL from an order of the District Court, overruling a demurrer to the complaint.

GILFILLAN, C. J. Appeal from an order overruling a general demurrer to the complaint. From the complaint it appears that the plaintiff was a passenger on one of defendant's cars running upon its line on Jackson street, St. Paul; that, when the car reached the intersection of that line with the defendant's cable-car line running on East Seventh street, the persons in charge of it negligently attempted to cross, and did cross, the cable line in front of a then near and rapidly approaching cable train thereon; that a collision seemed so imminent, and was so nearly caused, that the incident and attending confusion of ringing alarm bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of immediate death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness. The complaint shows a duty on the part of the defendant to exercise the highest

degree of care to carry the plaintiff safely. It also shows negligence in respect to that duty, and, if the negligence caused what the law regards as actionable injury, the action is well brought. Of course, negligence without injury gives no right of action. On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or a leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is in law a proximate cause is well expressed in the definition, often quoted with approval, given in *Milwaukee & St. Paul Railroad Co. v. Kellogg*, 94 U. S. 469, as follows: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement; or, as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

There may be succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease. A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily

break the required sequence of intermediate causes. If a passenger be placed, by the carrier's negligence, in apparent, imminent peril, and, obeying the natural instinct of self-preservation, endeavor to escape it by leaping from the car or coach, and in doing so is injured, he may, if there be no contributory negligence on his part, recover for the injury, although, had he remained in the car or coach, he would not have been injured. The endeavor to escape is not of itself contributory negligence. *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278. In such case, though there comes, as an intermediate cause between the negligence and injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury. The defendant suggests that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences. Certainly a woman in her condition has as good a right to be carried as any one, and is entitled at least to as high a degree of care on the part of the carrier. It may be that, where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition or health, he is more or less liable to injury. If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion.

Order affirmed.

BATTERY.¹**COLE V. TURNER.**

(6 Modern Reports, 149 [Case 210].—1704.)

HOLT, Chief Justice, upon evidence in trespass for assault and battery, declared—First, that the least touching of another in anger is a battery. Secondly, if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery. Thirdly, if any of them use violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt, will be a battery.

¹INSTANCES OF LAWFUL USE OF FORCE OR VIOLENCE.—“To use or attempt, or offer to use, force or violence upon or towards the person of another is not unlawful in the following cases:

“1. When necessarily committed by a public officer in the performance of a legal duty; or by any other person assisting him or acting by his direction;

“2. When necessarily committed by any person in arresting one who has committed a felony, and delivering him to a public officer competent to receive him in custody;

“3. When committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his lawful possession, if the force or violence used is not more than sufficient to prevent such offense;

“4. When committed by a parent or the authorized agent of any parent, or by any guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree;

“5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from a carriage, railway car, vessel or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force or violence used is not more than sufficient to expel the offending passenger, with a reasonable regard to his personal safety;

“6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.” N. Y. Penal Law, § 246.

MARENTILLE v. OLIVER.

(1 Pennington, 379.—1808.)

THIS was action of trespass, brought by the defendant in this court, against the plaintiff *in certiorari*. The state of demand charged the defendant below, that he unlawfully, forcibly, and with great violence, with a large stick, struck the horse of the plaintiff, on the public highway, which said horse was then before a carriage, in which the plaintiff was riding, on the said public highway, to the damage of the plaintiff, fifty dollars. This cause was tried by a jury, and verdict and judgment for the plaintiff, \$15 damages. It was assigned for error, because the suit was brought before the said justice to recover damages for an assault and battery, when, by law, such an action cannot be supported before a justice of the peace.

PENNINGTON, J. . . . 2d. To attack and strike with a club, with violence, the horse before a carriage, in which a person is riding, strikes me as an assault on the person; and if so, the justice had no jurisdiction of the action.

But if this is to be considered as a trespass on the property, unconnected with an assault on the person, I think that it was incumbent on the plaintiff below to state an injury done to the horse, whereby the plaintiff suffered damage; that he was in consequence of the blow bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing of him, or the like. All the precedents of declarations for injuries done to domestic animals, as far as my recollection goes, are in that way; and I think, with good reason. Suppose a man, seeing a stranger's horse in the street, was to strike him with a whip, or a large stick, if you please, and no injury was to ensue, could the owner of the horse maintain an action for this act? I apprehend not. For these reasons, I incline to think, that this judgment ought to be reversed.

KIRKPATRICK, C. J. Concurred in the reversal.

*Judgment reversed.*¹

¹ Opinion by ROSSELL, J., omitted. In accord, *Bull v. Colton*, 22 Barb. 94; *Clark v. Downing*, 55 Vt. 259. But see *Kirland v. State*, 43 Ind. 146, *post*.

KIRLAND V. THE STATE.

(43 Indiana, 146.—1873.)

BUSKIRK, J. This was a prosecution for an assault and battery commenced before a justice of the peace. The affidavit charges the appellant with having, at Marion county, on the 28th day of February, 1873, unlawfully, and in a rude, insolent and angry manner, touched, etc., Charles Bein.

The appellant was tried and found guilty by the justice. The case was appealed. It was tried on appeal in the Marion Criminal Court, where the State again obtained a verdict. The appellant moved for a new trial, which was overruled, and the judgment was rendered on the verdict.

The error assigned is the overruling of the motion for a new trial. A reversal of the judgment is asked mainly upon the ground that the court gave an erroneous instruction to the jury.

The instruction complained of as erroneous is as follows:

"2. To constitute a battery, the touching need not be of great force; a mere touching is sufficient, if it be unlawful and be done in a rude, or an insolent, or an angry manner. But this touching must be unlawful. A man may defend the possession of his estate and of his chattels by such reasonable force as may be necessary to that end; and if, in this case, you believe from the evidence, that at the time of the alleged assault and battery, Charles Bein was trespassing upon the lands of the defendant, and engaged in carrying away without right the corn of the defendant, the defendant had the right, after requesting Bein to depart, and a refusal on his part to leave the property and premises, to use such reasonable force as was necessary to eject him from the premises and protect his personal property; and if the defendant, in thus protecting his property and possession, touched Bein or assaulted him only so much as was reasonably necessary to secure the object aforesaid, he is not guilty, and you should so find. But if the jury believe from the evidence, that defendant rented the fields referred to in the evidence, no certain time being fixed for the termination of the lease, to Charley Bein, to be cultivated in corn, upon the shares, to be gathered by Bein, one-half to be delivered to defendant, and the other to be retained by the renter or tenant for his share, the mere fact that an agreement was made in the fall after, by which it was agreed that the tenant (Bein) take for his share of the corn the south field, and defendant the north field as his share, except three acres in the south field, this would not terminate the lease of itself, unless it was agreed between the parties that the lease should terminate. Nor would such facts authorize the defendant to

forcibly eject Bein from the field because he was gathering more corn for his own use than he was entitled to by such agreement; and if, under such circumstances, the defendant struck or beat Bein, while he was gathering corn in the field, or while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner with a stick, the defendant is guilty of an assault and battery."

The Statute says: "Every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc. 2 G. & H. 459.

It is quite clear, therefore, that no assault and battery can be committed, unless one person touches another person unlawfully, and in a rude, or insolent, or angry manner. The affidavit charges that the appellant thus touched Charles Bein. To sustain this charge, the evidence must show the unlawful touching, etc., of Charles Bein. The charge excepted to, however, instructs the jury, that, if the defendant struck Charles Bein's horses with a club, in a rude and angry manner, while Bein was driving his team, in the act of gathering corn, etc., the defendant is guilty of an assault and battery. In this instruction the court deems the touching of Bein wholly immaterial and unimportant; to strike Bein's horses is to strike him, that is, if they were struck with a club, and it was done while he was driving his team in the field, in the act of gathering corn. To strike the horses of Bein was in no legal or logical sense to strike him. True, if the blow touched both Bein and his horse, the touching would be an assault and battery on Bein, not because of the touching of his horse, however, but for the reason that it touched him.

And if the appellant struck and drove Bein's horse, or any other horse, against him violently, unlawfully, and in a rude, etc., manner, then he would be guilty, not because he struck the horse, but for the reason that he struck Bein by running or pushing the horse against him. If Bein was so connected with his horses when they were struck, that the blow took effect on his person as well as that of the horses, then the person striking the blow would be guilty.

Bishop, in his work on Criminal Law, in sec. 72, vol 2, says: "The slightest unlawful touching of another, especially if done in anger, is sufficient to constitute a battery. For example, spitting in a man's face, or on his body, or throwing water on him, is such. And the inviolability of the person, in this respect, extends to everything attached to it."

Russell, on Crimes, vol 1. p. 751, says: "The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite. . . . And it seems that it is not necessary that the assault should be immediate; as where the defendant

threw a lighted squib into a market-place, which, being tossed from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. And the same has been holden where a person pushed a drunken man against another."

Greenleaf on Evidence, in discussing the question of battery, says: "A battery is the actual infliction of violence on the person. This averment will be proved by evidence of any unlawful touching of the person of the plaintiff, whether by the defendant himself, or by any substance put in motion by him. The degree of violence is not regarded in the law; it is only considered by the jury, in assessing the damages in a civil action, or by the judge in passing sentence upon indictment. Thus, any touching of the person in an angry, revengeful, rude, or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile, or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner, to detain him, is a battery. So, striking the skirt of his coat or the cane in his hand, is a battery. For anything attached to his person partakes of its inviolability."

Blackstone defines a battery as follows:

"3. By battery, which is the unlawful beating of another. The least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner." 3 Cooley's Blackstone, 120.

Note 4 by Judge COOLEY, on same page, reads as follows: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29, b. n. 1; id. 13 and 14, n. 3. Taking a hat off the head of another is no battery. 1 Saund. 14. It must be either willfully committed, or proceed from want of due care: Stra. 596; Hob. 134; Plowd. 19; otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy: 3 Wils. 303; Bac. Ab. assault and battery, B.; but the absence of intention to commit the injury constitutes no excuse, where there has been a want of due care. Stra. 596; Hob. 134; Plowd. 19. But if a person unintentionally push against another in the street, or if without any default in the rider a horse runs away and goes against another, no action lies. 4 Mod. 405. Every battery includes an assault; Co. Litt. 253; and the plaintiff may recover for the assault only, though he declares for an assault and battery. 4 Mod. 405."

Counsel for appellee have referred us to the following adjudged cases as supporting the instruction under examination: *Respublica v. De Longchamps*, 1 Dallas, 1110; *The State v. Davis*, 1 Hill S. C. 46; *Dubuc De*

Marentille v. Oliver, Penning, 379; *The United States v. Ortega*, 4 Wash. C. C. 531.

The case referred to in Dallas was a prosecution under the laws of nations for an assault and battery upon the Minister of the French Government resident in this country. It was proved upon the trial that the defendant struck with a cane the cane of the French Minister. The court say: "As to the assault, this is, perhaps, one of the kind, in which the insult is more to be considered than the actual damage; for though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen, too often induce duellings, and terminate in murder. As, therefore, anything attached to the person, partakes of its inviolability, De Longchamps' striking Monsieur Marbois' cane, is a sufficient justification of that gentleman's subsequent conduct."

The case referred to in Pennington, *supra*, was a civil action for a trespass committed by the defendant on the property of the plaintiff, by striking with a large club the plaintiff's horse, which was before a carriage in which the plaintiff was riding. The court say: "To attack and strike with a club, with violence, the horse before a carriage, in which a person is riding, strikes me as an assault on the person; and if so, the justice had no jurisdiction of the action. But if this is to be considered as a trespass on property, unconnected with an assault on the person, I think it was incumbent on the plaintiff below, to state an injury done to the horse, whereby the plaintiff suffered damage; that he was in consequence of the blow bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing of him or the like."

The above case being an action of trespass for an injury to the horse of the plaintiff and not a prosecution for an assault, or an assault and battery upon the person of the plaintiff, we think that but little importance should be attached, or weight given to the loose remark of the judge, that the striking of a horse attached to a carriage was an assault upon the person riding in the carriage.

The case of *The State v. Davis*, *supra*, was a prosecution for an assault upon an officer, in releasing from his custody a negro. The facts will sufficiently appear from the quotation which we make from the opinion of the court. The court say:

"The general rule is, that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist, within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not

necessary to an assault. It has, therefore, been held that beating a house in which one is, striking violently a stick which he holds in his hand, or the horse on which he rides, is an assault; the thing in these instances partaking of the person's inviolability. *Respublica v. De Longchamps*, 1 Dall. 114; *Wambough v. Shank*, Penning, 229, cited in 2 part Esp. Dig. 173.

"What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and legally speaking, the defendants had no right to retake him with force. As far as words could go, their conduct was rude and violent, in the extreme. They broke the chain with which the negro was confined to the bed-post, in which the prosecutor slept, and cut the rope by which he was confined to his person, and are clearly within the rule. The rope was as much identified with his person, as the hat or coat which he wore, or the stick which he held in his hand. The conviction was therefore right."

We are inclined to the opinion that the chain and rope so connected together the prosecutor and negro, as to make the identification as complete as the hat or coat on the person or the stick in the hand. The ruling in the above case was based upon the close and intimate connection which existed between the prosecutor and the negro; but no such identity or connection between the prosecutor and his horses in the case in judgment is shown.

The case of *The United States v. Ortega, supra*, was a prosecution instituted by the United States, for the purpose of vindicating the law of nations and of the United States, offended, as was alleged, in the person of a foreign minister, by an assault committed on him by the defendant. The proof was, that the defendant seized hold of the breast of the coat of Mr. Salmon, the prosecuting witness, and retained his hold while he enumerated his cause of grievance, and until a third person came up and compelled him to release his hold.

The court said: "It was argued by the counsel for the defendant, that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offense; and that nothing more is proved in this case, even by Mr. Salmon. It is very true that these acts may be done, very innocently, without offending the law. If done in friendship, for a benevolent purpose, and the like, the act would certainly not amount to an assault. But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount, not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger, or in a menacing manner, are considered by the law as assaults."

It is very obvious that the above cases do not support the position

assumed by the counsel for appellee, but are in entire accord with the elementary writers from whom we have quoted.

The most accurate and complete definition of a battery that we have met with is that given by Saunders, and which has been adopted by most subsequent writers, and that is: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him." By this definition, it is an essential prerequisite that the person must either be touched by the aggressor himself or by the substance put in motion by him. There must be a touching of the person. One's wearing apparel is so intimately connected with the person, as in law to be regarded, in case of a battery, as a part of the person. So is a cane when in the hand of the person assaulted.

But in the case under consideration, the court ignores all these things and instructs the jury to convict on proof alone of the striking of the horses of the prosecuting witness. *It is not even necessary, according to this charge, that the prosecuting witness should have been in the wagon or holding the lines, or connected with or attached to the horses in any way.* That Bein was driving his team and gathering his corn does not necessarily so connect him with the horses that the touching of the horses would be an assault and battery on him. He may have been, as is frequently done, driving his horses from one pile of corn to another, by words of command, without being in the wagon or having hold of the lines.

The law was correctly stated by the court in the first charge given to the jury. It was as follows: "Before you will be justified in finding the defendant guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant, at, etc., . . . in a rude, or an insolent, or an angry manner, touched Charles Bein."

In placing a construction upon the instruction complained of, it is our duty to look at all the instructions given on the same subject; and, if the instructions taken together present the law correctly and are not calculated to mislead the jury, we should affirm the judgment.

On the other hand, if the two charges are inconsistent with each other, if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to what was the law as applicable to the facts of the case, then the judgment should be reversed. *Somers v. Pumphrey*, 24 Ind. 231. The above rules have been applied by this court in civil cases. The rule laid down in criminal causes is as follows: "An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction, which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury." *Bradley v. The State*, 31 Ind. 492.

Construing these charges together, how do they stand? The jury are first told that, to justify a finding of guilty, they must be satisfied beyond a reasonable doubt that the defendant touched Charles Bein;

and then, in the second charge, the court continues, that the defendant might lawfully employ reasonable force, etc., in defense of his possession or property, but that under circumstances hypothetically put by the court, Charles Bein had the right to be on the defendant's premises gathering corn, "and if under such circumstances, etc., while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner, with a stick, the defendant is guilty of an assault and battery."

Plainly, then, the charge is that the evidence must show the touching of Charles Bein by the defendant, but that if Bein is driving his team, etc., and the defendant strikes his horses (that is Bein's horses) with a stick, in a rude and angry manner, then, such touching of the horses is, in law, a touching of Bein, and the defendant is guilty of an assault and battery. Logically the charge states the law thus: Generally, to sustain a charge of assault and battery on A., it is essential to prove a touching of A. by the defendant, but under certain circumstances, such as if A. is driving his team, etc., and the defendant touches the horses of A., then, in that case, such touching of the horses is a touching of A., and if such touching of the horses is unlawfully done, and made, etc., then the defendant may be found guilty of an assault and battery on A.

There was evidence tending to prove that the defendant struck Charles Bein. He and his two sons, Edward and Frank, so swear. The defendant swears he did not.

The following is briefly the evidence tending to prove the assault and battery upon the horses:

Charles Bein testified: "He hit my horses on the head with a big club about three feet long. . . . He struck my horses two or three times. . . . He was mad. . . . I was loading corn out of the piles; was loading up corn when he struck the horses."

Same witness on cross-examination testifies: "When he struck the horses, he struck them on the head, and they stopped, etc. Don't know who held the lines. Maybe my little boy held one and me the other. . . . He struck the horse next to me. . . . The team was made to stand when defendant struck the horses. . . . I was not in the wagon when he struck them."

Edward Bein testified: "Kirland hit the horses on the head, and they stopped. We were just going to drive out. My father was then standing on the ground near the wagon. Defendant put his hands on the horses to unhitch them from the wagon; tried to unhitch the traces. Just before that he struck the horses, when father was standing on the other side of the wagon."

Frank Bein testified, "At the time the horses were struck, father was in the wagon."

The defendant testifies, that he "didn't touch the horses, except that he attempted to unhitch them from the wagon."

It is apparent that there was evidence in the case to which the second instruction was applicable. The verdict being general we are unable to determine whether he was convicted for touching the person of Bein, or for striking his horses. It may be that the jury found the defendant guilty of striking the horses of Bein, for the defendant admitted that he attempted to unhitch the horses from the wagon, and consequently must have touched them, while he positively denies that he touched the person of the prosecuting witness. Besides, there was evidence tending to impeach the character of Bein. The jury may, therefore, have doubted, reasonably, the guilt of the defendant in the striking of Bein, and found him guilty only of having "in a rude and angry manner struck the horses of Bein with a stick," while "he was driving his team in the act of gathering corn."

The second instruction was inapplicable to the evidence and was calculated to mislead the jury, and being erroneous, the judgment should be reversed.

The judgment is reversed; and the cause is remanded, for a new trial in accordance with this opinion.

SULLIVAN V. DUNHAM.

(161 New York, 290.—1900.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 15, 1898, unanimously affirming a judgment entered upon a verdict in favor of the plaintiff.

On the 10th of June, 1895, Annie E. Harten, the plaintiff's intestate, a young lady nineteen years of age, while traveling on a public highway near the village of Irvington, in the county of Westchester, was killed by a blow from a section of a tree which fell upon her, after it had been hurled more than four hundred feet by a blast. The defendants, Dinkel and Jewell, as copartners, had been employed by the defendant Dunham, the owner of a tract of rough land, to blast out certain trees standing upon it. On the south side of the tract, about three hundred feet from the nearest point of the highway in question, there was a large living elm tree, from sixty to seventy feet in height, between which and the highway was some woodland. Dynamite was placed under the roots of this tree and exploded, shattering it and throwing a section of the stump over the intervening forest, a distance of four hundred and twelve

feet, to a point in the highway where the plaintiff's intestate was traveling. She was struck by it with such force as to cause her death within a few hours. This action was brought to recover damages for the benefit of the next of kin on account of the death of the plaintiff's intestate, caused, as alleged, by the wrongful act of the defendants.

VANN, J. The main question presented by this appeal is whether one who, for a lawful purpose and without negligence or want of skill, explodes a blast upon his own land and thereby causes a piece of wood to fall upon a person lawfully traveling in a public highway, is liable for the injury thus inflicted.

The statute authorizes the personal representative of a decedent to "maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued." Code Civ. Pro. § 1902. It covers any action of trespass upon the person, which the deceased could have maintained if she had survived the accident. Stated in another form, therefore, the question before us is whether the defendants are liable as trespassers.

This is not a new question, for it has been considered, directly or indirectly, so many times by this court that a reference to the earlier authorities is unnecessary. In the leading case upon the subject, the defendant, in order to dig a canal authorized by its charter, necessarily blasted out rocks from its own land with gunpowder, and thus threw fragments against the plaintiff's house, which stood upon the adjoining premises. Although there was no proof of negligence, or want of skill, the defendant was held liable for the injury sustained. All the judges concurred in the opinion of GARDINER, J., who said: "The defendants had the right to dig the canal. The plaintiff the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property. The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury,

without regard to its extent or the motives of the aggressor. . . . He may excavate a canal, but he cannot cast the dirt or stone upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." *Hay v. Cohoes Co.*, 2 N. Y. 159.

This case was followed immediately by *Tremain v. Cohoes Co.*, 2 N. Y. 163, a similar action against the same defendant, which offered to show upon the trial "that the work was done in the best and most careful manner." It was held that the evidence was properly excluded because the manner in which the defendant performed its work was of no consequence, as what it did to the plaintiff's injury was the sole question.

These were cases of trespass upon lands, while the case before us involves trespass upon the person of a human being, when she was where she had the same right to protection from injury as if she had been walking upon her own land. As the safety of the person is more sacred than the safety of property, the cases cited should govern our decision unless they are no longer the law.

The *Hay* case was reviewed by the Commission of Appeals in *Losee v. Buchanan*, 51 N. Y. 476, 479, where it was held that one who, without negligence and with due care and skill, operates a steam boiler upon his own premises, is not liable to his neighbor for the damages caused by the explosion thereof. That was not a case of intentional but of accidental explosion. A tremendous force escaped, so to speak, from the owner, but was not voluntarily set free. The court, commenting upon the *Hay* case, said: "It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land."

The *Hay* case was expressly approved and made the basis of judgment in *St. Peter v. Denison*, 58 N. Y. 416, where a blast, set off by a contractor with the state in the enlargement of the Erie canal, threw a piece of frozen earth against the plaintiff when he was at work upon the adjoining premises for the owner thereof. In holding the contractor liable the court said: "Even if it should be conceded that the defendant had the right, from being a contractor with the state, to do all that which the state might do, in the progress of the work; I do not think that this would justify him. in the state of facts which this case presents,

in casting material upon the premises of a private owner, upon which the plaintiff was lawfully engaged. The state could not intrude upon the lawful possession of a citizen, save in accordance with law. Unless authorized by law so to do, the casting of a stone from the bed of the canal upon the land of an adjoining proprietor, either by the state or an individual, was a trespass. *Hay v. Cohoes Co.*, 2 N. Y. 159. . . . Nor can the defendant protect himself from liability, for that his act of blasting out the rock with gunpowder was necessary and hence, that the effects of it upon the adjacent premises were an unavoidable result of a necessary act. The case of *Hay v. Cohoes Co.*, *supra*, shows that unless there is a right to the use of the adjacent lands for the purposes of the work, it matters not that the mode adopted of carrying on the work was necessary. . . . It follows, then, that the defendant having no right to invade the premises, which, for the purposes of this case, were the possession of the plaintiff, it matters not whether or no he made his invasion without negligence. *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Pixley v. Clark*, 35 id. 520."

This case is analogous to the one before us, because the person injured did not own the land upon which he stood when struck, but he had a right to stand there the same as the plaintiff's intestate had a right to walk in the highway. We see no distinction in principle between the two cases.

In *Mairs v. Manhattan Real Estate Association*, 89 N. Y. 498, 505, the defendant was held liable without proof of negligence for making an excavation upon his own land, through which, during a heavy rain, water found its way into the cellar of the adjoining owner, although the excavation was made under a license from the municipal authorities. RAPALLO, J., speaking for all the judges, said: "The rights of the parties in such a case do not depend upon the same principles as in cases where the wrong complained of consists of an interference with a public highway to the injury of the traveling public, but upon the principle of *Hay v. Cohoes Co.*, 2 N. Y. 159, *St. Peter v. Denison*, 58 N. Y. 416, and *Jutte v. Hughes*, 67 N. Y. 267, in which it is held that where one in making improvements on his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence. A license from the municipal authorities cannot affect the question of responsibility in such cases."

When the injury is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability in the absence of negligence. Thus in *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, a contractor with the United States government, in doing work required by his contract, injured property by concussion only and without casting any material upon the premises of the

plaintiff. It was held that there could be no recovery without proof of negligence. The Second Division of this court in deciding that case said: "This is not a case of taking private property, or of direct, but is of consequential injury. The plaintiff's house was 3,000 feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosion. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substances upon them, as in *Hay v. Cohoes Co.*, 2 N. Y. 159, *Tremain v. Cohoes Co.*, 2 N. Y. 163, and *St. Peter v. Denison*, 58 N. Y. 416, and, hence, no going outside of the authority actually conferred and conferable as in those cases. . . . One cannot confine the vibration of the earth or air within enclosed limits, and hence it must follow that if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless."

The facts were similar in *Booth v. R. W. & O. T. R. R. Co.*, 140 N. Y. 267, where it was "not claimed that any rock or materials were thrown by the blasts upon the plaintiff's lot." While it did not appear in what particular way the injury was produced, it was inferred "that it was caused by the jarring of the ground or the concussion of the atmosphere created by the explosions, or by both causes combined." It was held that the charge of the trial judge, that "it made no difference whether the work was done carefully or negligently," was erroneous, and the judgment was reversed for that reason. All the judges concurred in saying, "We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.*, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This the court held could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. . . . The defendant here was engaged in a lawful act. It was done on its own land to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings nearby were not injured. The immediate act was confined to its own land, but the blasts, by setting the air in motion, or in some other unexplained way, causing an injury to the plaintiff's house. . . . The blasting was

necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint."

The *Hay* case has been repeatedly cited by this court, but has never been overruled or even criticised, so far as we have discovered. *Radcliff v. Mayor*, 4 N. Y. 195, 199; *Pixley v. Clark*, 35 N. Y. 520, 523; *Jutte v. Hughes*, 67 N. Y. 267, 273; *Heeg v. Licht*, 80 N. Y. 579, 583; *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 26. It has been several times distinguished from cases to which it clearly did not apply, such as that class where the injury was not direct but consequential, of which illustrations have already been given. It has also been distinguished, if that word may be used to point out differences between cases which rest upon wholly different principles, in that line of authorities which hold that where the work is not bound to produce injury and is done wholly by an independent contractor, with no control by the owner, the former only is liable. We cite, as an example of this class, *McCafferty v. Spuyten Duyvil & P. M. R. R. Co.*, 61 N. Y. 178, where it was held that the defendant was not chargeable with the negligent acts of another in doing work upon his lands unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him. It is said in the prevailing opinion that "the case of *Hay v. Cohoes Co.*, 2 Comst. 159, is not an authority, and has never been regarded as an authority upon the questions involved in this case. It was there assumed that the persons who caused the injuries complained of were the agents and servants of the defendants, and the only question considered in the Court of Appeals was, whether the defendants could be made liable without the proof of negligence."

Pack v. City of New York, 8 N. Y. 222; *Kelly v. City of New York*, 11 N. Y. 432; *Herrington v. Vil. of Lansingburgh*, 110 N. Y. 145; *Roemer v. Striker*, 142 N. Y. 134; *French v. Vix*, 143 N. Y. 90, and *Berg v. Parsons*, 156 N. Y. 109, were of like character, and turned upon the liability of an independent contractor, as distinguished from that of the owner, and in some of them also the injuries were indirect and consequential, having been caused by concussion or vibration. *Driscoll v. Newark, etc., Co.*, 37 N. Y. 637, was tried and decided on the theory of negligence, and as the recovery was simply sustained on that ground, without considering the subject of trespass, which, for some reason, was kept out of the case, it has no bearing upon the question before us.

Marvin v. Brewster Iron Mining Co., 55 N. Y. 538, is also relied upon by the appellants. In that case the plaintiff's grantor had purchased a house standing over a mine, which, with the right to work it, had been reserved. It was held that the plaintiff could not enjoin his grantor from

blasting in the mine at night, so as to disturb those sleeping in the house. The *Hay* case was distinguished, because the plaintiff therein "had the right of undisturbed possession of his property," whereas in the *Marvin* case his right was subject to that of the defendant to work its mine in the usual way, which was the sole use it could make of its property, and to which use the plaintiff, through his grantor, had expressly assented. When there is a conflict of rights public policy requires one to give up the right of a particular use rather than permit him by such use to destroy his neighbor's property altogether. In the case cited, however, the particular use was the only one possible, and the right to that use was imposed as "a serious servitude" upon the surface land, which was all that belonged to the plaintiff.

We think that the *Hay* case has always been recognized by this court as a sound and valuable authority. After standing for fifty years as the law of the state upon the subject it should not be disturbed, and we have no inclination to disturb it. It rests upon the principle, founded in public policy, that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure by preventing such a use of one piece by one man as may injure all his neighbors. It makes human life safer by tending to prevent a landowner from casting, either with or without negligence, a part of his land upon the person of one who is where he has a right to be: It so applies the maxim of *sic utero tuo* as to protect person and property from direct physical violence, which, although accidental, has the same effect as if it were intentional. It lessens the hardship by placing absolute liability upon the one who causes the injury. The accident in question was a misfortune to the defendants, but it was a greater misfortune to the young woman who was killed. The safety of travelers upon the public highway is more important to the state than the improvement of one piece of property, by a special method, is to its owner. As was said by the Supreme Court of Indiana, in following the *Hay* case: "The public travel must not be endangered to accommodate the private rights of individuals." *Wright v. Compton*, 53 Ind. 337.

We think the courts below were right in holding the defendants liable as trespassers, regardless of the care they may have used in doing the work. Their action was a direct invasion of the rights of the person injured, who was lawfully in a public highway, which was a safe place until they made it otherwise by throwing into it the section of a tree.

We find no reversible error in the record before us. While the complaint suggests negligence as the gravamen of the action, it was tried upon the theory of trespass, and no ruling was made, or exception taken, which raised any question as to the scope of the pleadings, or suggested the propriety of a motion for leave to amend. We can consider no

objection unless it was taken upon the trial and saved by an exception. *Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437. Moreover, if every allegation relating to negligence were struck from the complaint, it would still set forth a cause of action in trespass.

The question whether the defendants, Dinkel and Jewell, were independent contractors was settled by the jury, and after unanimous affirmance by the Appellate Division, is beyond our power of review. *Szuchy v. Hillside Coal & Iron Co.*, 150 N. Y. 219. There is no exception relating to the admission of evidence, or to the charge of the court, which requires a reversal.

The judgment is right and should be affirmed, with costs.

All concur, except GRAY, J., not voting.

Judgment affirmed.

HOLMES v. MATHER.

(L. R. 10 Exchequer, 261.—1875.)

THE first count of the declaration alleged that the female plaintiff was passing along a highway, and the defendant so negligently drove a carriage and horses in the highway that they ran against her and threw her down, whereby she and the male plaintiff were damnified.

The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff and wounded her, whereby, &c.

Plea, not guilty, and issue thereon.

At the trial before FIELD, J., at the spring assizes for Durham, 1875, the following facts were proved: In July, 1874, the defendant kept two horses at a livery stable in North Shields, and wishing to try them for the first time in double harness, had them harnessed together in his carriage. At his request a groom drove, the defendant sitting on the box beside him. After driving for a short time, the horses being startled by a dog which suddenly rushed out and barked at them, ran away and became so unmanageable that the groom could not stop them, though he could to some extent guide them. The groom begged the defendant to leave the management to him, and the defendant accordingly did not interfere. The groom succeeded in turning the horses safely round several corners, and at last guided them into Spring Terrace, at the end of which and at right angles runs Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they arrived at the end of Spring Terrace the horses made a sudden swerve to the right, and the groom then pulled them more to the right, thinking

that was the best course, and tried to guide them safely round the corner. He was unable to accomplish this, and the horses were going so fast that the carriage was dashed against the palisades in front of the shop; one of the horses fell, and at the same time the female plaintiff, who was on the pavement near the shop, was knocked down by the horses and severely injured. The jury stopped the case before the close of the evidence offered on the defendant's part, and said that in their opinion there was no negligence in any one. The plaintiff's counsel contended that since the groom had given the horses the direction which guided them against the female plaintiff, that was a trespass which entitled the plaintiffs to a verdict on the second count.

The verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for £50 on the second count, the Court to be at liberty to draw inferences of fact, and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised.

HERSCHELL, Q. C., obtained a rule *nisi* to enter the verdict for the plaintiffs for £50, pursuant to leave reserved, on the ground that, upon the facts proved, the plaintiffs were entitled to a verdict on the trespass count.

BRAMWELL, B. I am inclined to think, upon the authorities, that the defendant is in the same situation as the man driving; but, without deciding that question, I assume, for the purposes of the opinion I am about to express, that he is as much liable as if he had been driving.

Now, what do we find to be the facts? The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavors to do what is the best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye, and so injured it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

That is the general view of the case. Now I will put it a little more specifically, and address myself to the argument of Mr. Herschell. Here, he says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the direction of the plaintiff,—

he drove them there. It is true that he endeavored to drive them further away from the place by getting them to turn to the right, but he did not succeed in doing that. The argument, therefore, is, if he had not given that impulse or direction to them, they would not have come where the plaintiff was. Now, it seems to me that argument is not tenable, and I think one can deal with it in this way. Here, as in almost all cases, you must look at the immediate act that did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked to the last act but one, you might as well argue that if the driver had not started on that morning, or had not turned down that particular street, the mischief would not have happened.

I think the proper answer is, you cannot complain of me unless I was immediately doing the act which did the mischief to you. Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. That is not the case at all. The driver was endeavoring to guide them indeed, but he was taken there in spite of himself. I think the observation made by my Brother POLLOCK during the argument is irresistible, that if Mr. Herschel's contention is right, it would come to this: if I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions. . . . I think, therefore, that our judgments should be for the defendant. . . .

POLLOCK, B., concurred.

*Rule discharged.*¹

¹ Opinion by CLEASBY, B., omitted. See, also, *Vincent v. Stinehour*, 7 Vt. 62.

BROWN V. KENDALL.

(6 Cushing, 292.—1850.)

THIS was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before WELLS, C. J., in the court of Common Pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated, and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulders, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The defendant requested the judge to instruct the jury, that "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover."

The defendant further requested the judge to instruct the jury, that, "under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff."

The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: "If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was

inevitable, using the word inevitable not in a strict but a popular sense."

"If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C. J. This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which the action would abate by the death of either party, is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. Sts. c. 93, § 7.

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases, is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*, 3 East, 593; *Hugget v. Montgomery*, 2 N. R. 446, Day's Ed. and notes.

In these discussions it is frequently stated by judges, that when one

receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These *dicta* are no authority, we think, for holding, that damages received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, nor careless. In the principal case cited, *Leame v. Bray*, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. In the course of the argument of that case (p. 595), LAWRENCE, J., said: "There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because, though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85-92; *Wakeman v. Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*, 2 Chit. 639; Com. Dig. "Battery," A (Day's Ed.) and notes; *Vincent v. Stinehour*, 7 Vt. 62. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given, to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term "ordinary care," it may be proper to state that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care which pru-

dent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise

of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev. § 85; *Powers v. Russell*, 13 Pick. 69, 76; *Tourtellot v. Rosebrook*, 11 Met. 460.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

CONSENT.

BARHOLT V. WRIGHT.

(45 Ohio State, 177.—1887.)

IN an action to recover damages for an assault and battery, the judge charged the jury that if the parties went out to fight by agreement, and the plaintiff received the injuries complained of from the defendant in the course of it, he could not recover. Verdict for defendant.

A motion for a new trial, assigning error in the charge, was overruled and a bill of exceptions taken. Upon error the circuit court reversed the judgment and ordered a new trial; the defendant now prosecutes error to reverse that judgment.

MINSHALL, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff, if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim, as old as the law, *volenti non fit injuria*, forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. Broom, Leg. Max. 268.

But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement, may be shown in mitigation of damages. 2 Greenleaf Ev. § 85; *Logan v. Austin*, 1 Stewart, 476. This, however, is the full extent to which the cases have gone. We will notice a few of them. In *Boulter v. Clark*, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the Chief Baron saying, "the fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action." Buller's Nisi Prius, 16. A number of earlier cases were cited, and among them that of *Mathew v. Ollerton*, Comb. 218, where it is said, "that if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that this case was not for an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Stephen's Nisi Prius, 211, it is said: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in *Bell v. Hansley*, 3 Jones, N. C. 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for

such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply." The following cases are to the same effect: *Stout v. Wren*, 1 Hawks, 420; *Adams v. Waggoner*, 33 Ind. 531; *Shay v. Thompson*, 59 Wis. 540; *Logan v. Austin*, 1 Stewart, 476. And so it was held in *Commonwealth v. Collberg*, 119 Mass. 350, that where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill-will. *Champer v. State*, 14 Ohio St. 437, is not in conflict with this, as will be explained hereafter.

No case has been cited that can be said to be to the contrary. What is said by PECK, J., in *Smith v. State*, 12 Ohio St. 466, that "an assault upon a consenting party would seem to be a legal absurdity," must be applied to the facts of that case. The judge was discussing the sufficiency of a count in an indictment for an assault with intent to commit a rape, without an averment that it was made forcibly and against the will of the female. The absence of consent is essential to the crime of rape, or of an assault with intent to commit a rape, where the female has arrived at the age at which consent may be given. Intercourse, because illicit, does not amount to an assault where the female consents, however wrong it may be in morals. This is all that was meant by the learned judge in using the language quoted from his opinion.

In all such cases the consent of the female would, without doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge COOLEY in his work on Torts, p. 163, that, "consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. . . . A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The State is wronged by this and forbids it on public grounds. . . . The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order." See also, to like effect, Pollock on Torts, 139.

Neither is the case of *Champer v. State*, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The case seems to have been somewhat misapprehended by the courts of some of the States, as well as by some text-writers. By the statutes of this state a distinct offense is made of an affray or agreement to fight; and the effect of the holding is that where such an offense is committed, the indictment must be for an affray, and not for an assault and battery.

The civil right of either party to recover of the other for injuries received in an affray, is not affected by the statute nor by the decision just referred to. Such seems to have been the view taken by BOYNTON, J., in the subsequent case of *Darling v. Williams*, 35 Ohio St. 63.

The case of *Fitzgerald v. Cavin*, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm if the act was intentionally done.

It is upon the same principle of public policy that one, who is the first assailant in a fight, may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the assailant, for the excess of force used beyond what was necessary for self-defense. *Dole v. Erskine*, 35 N. H. 503, criticising *Elliott v. Brown*, 2 Wend. 499; *Cooley on Torts*, 165; *Darling v. Williams*, 35 Ohio St. 63; *Gizler v. Witzel*, 82 Ill. 322. And see also *Commonwealth v. Collberg*, *supra*.

It would seem that under the code the right of each combatant to damages might be determined and measured in the same action. Swan's Plead. Prec. 259, n. a.

And upon like principle it has been ruled that the doctrine of contributory negligence has no application to an action to recover damages for an assault and battery. *Ruter v. Foy*, 46 Iowa, 132; *Steinmetz v. Kelly*, 72 Ind. 442; *Whitehead v. Mathaway*, 85 Ind. 85. Negligence of the plaintiff contributing to the injury of which he complains, is taken into consideration only in those cases, where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong.

A question was made as to the admissibility of the evidence of an agreement to fight, under the issue made by the pleadings—the answer being a general denial. If the evidence had been competent for any purpose, other than in mitigation of damages, it would have been under the issue as made. It was insisted on in denial of the right of action, and not as an avoidance of it; so that it was not necessary to be pleaded as new matter. If it had been so pleaded it would have been subject to a demurrer. We think the court erred in its charge to the jury. The injury inflicted, the loss of a finger, was a severe one; it amounted in fact to a mayhem. "Where the injury," (a mayhem,) says the author of a recent and quite valuable work on criminal procedure, "takes place during a conflict, it is not necessary to a conviction that the accused should have formed the intent before engaging in the conflict. It is sufficient if he does the act voluntarily, unlawfully, and on purpose." Maxwell's Crim. Proc. 260. It was permissible to the defendant to show

the agreement to fight in mitigation of damages, but not as a bar to the action.

*Judgment affirmed.*¹

JUSTIFICATION: DEFENSE OF PERSON AND PROPERTY.

SCRIBNER V. BEACH.

(4 Denio, 448.—1847.)

TRESPASS for assault and battery. Plea, not guilty, with notice of “*son assault demense*,” and that the assault was committed in defense of defendant’s property.

It appeared that the affair which gave rise to the action happened in August 1842, on a piece of land in Catskill, of which the defendant had been in possession about three years before. He removed to Herkimer county and the plaintiff succeeded to the occupancy of the land, and had burned a coal pit upon it, and was engaged in taking the coal to market. While he was absent for that purpose, the defendant came to the pit and commenced raking out the coal with a rake he found there, having a wagon in readiness to take the coal away. While thus engaged the plaintiff came there and asked the defendant what he was doing. Defendant said if he came there he would show him. Upon this the plaintiff took hold of the rake with a view of taking it from the defendant, who letting go, with one hand knocked the plaintiff down. As he arose he again took hold of the rake, but the defendant pulled it away, and with it aimed a blow at the plaintiff’s head, which the latter sought to prevent by putting up his hand. The rake struck his arm near the wrist and fractured the bone.

The defendant offered to show that he had title to the land upon which the coal pit was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon that land. The plaintiff’s counsel objected to this evidence, and the objection was sustained and the evidence excluded. Verdict for the plaintiff \$150. The defendant moves for a new trial on a case.

By the Court, JEWETT, J. Self-defense is a primary law of nature, and it is held an excuse for breaches of the peace and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defense, prevention or recovery, so as to become vindic-

¹ See Erwin’s Summary of Torts, 2d ed., pp. 77–80.

tive; for then, the defender would himself become the aggressor. The force used must not exceed the necessity of the case. *Elliott v. Brown*, 2 Wend. 497; *Gates v. Lounsbury*, 20 John. R. 427; *Gregory v. Hill*, 8 T. R. 299; *Baldwin v. Hayden*, 6 Conn. R. 453; 3 Bl. Com. 3 to 5; 1 Hawk. P. C. 130; *Cockroft v. Smith*, 2 Salk. 642; *Curtis v. Carson*, 2 New Hamp. R. 539.

A man may justify an assault and battery in defense of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C. b. 1, c. 60, § 23; *Seaman v. Cuppledick*, Owen's R. 150. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses, he should gently lay his hands on him for the purpose of removing him, and if he resist with force, then force sufficient to expel him may be used in return by the owner. *Weaver v. Bush*, 8 Term R. 78; Butler's N. P. 19; 1 East, P. C. 406. It is otherwise, if the trespasser enter the close with force; in that case the owner may without previous request to depart or desist, use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose, only, of subduing his violence.

"A civil trespass," says HOLROYD, J., "will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house; he ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity." *Mead's Case*, 1 Lewin, C. C. 185; Roscoe's Ev. 262. The rule is, that in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person (as to rob, or murder or to commit rape upon a woman), or upon a man's habitation or property (as arson or burglary), the person assaulted may repel force by force; and even his servant, then attendant on him, or any other person present, may interpose for preventing mischief; and in the latter case, the owner, or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. Foster's Crown Law, 273.

The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus, a person having a right to the possession of lands, may enter by force, and turn out a person who has a mere naked possession, and cannot be made answerable in damages to a

party who has no right, and is himself a *tort-feasor*. Although if the entry in such case be with a strong hand, or a multitude of people, it is an offense for which the party entering must answer criminally. *Hyatt v. Wood*, 4 John. R. 150; *Sampson v. Henry*, 13 Pick. 36.

In respect to personal property, the right of recaption exists, with the caution that it be not exercised violently, or by breach of the peace; for should these accompany the act, the party would then be answerable criminally. But the riot, or force, would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it, to one who was not the owner. *Hyatt v. Wood, supra*. In the case of personal property, improperly detained or taken away, it may be taken from the house and custody of the wrong-doer, even without a previous request; but unless it was seized or attempted to be seized forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrong-doer to recover it. *Weaver v. Bush, supra*; Com. Dig. Pleader, 3 M. 17; *Spencer v. McGowen*, 13 Wend. 256.

In one branch of the defense the defendant set up *son assault demesne*. That was overthrown by evidence showing a manifest disproportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defense of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defense of which he committed the assault. To sustain this defense he proposed to prove, that the coal pit was on new and unimproved land to which he had title, and that the wood from which the coal was made was cut from this land without any authority from him; but this evidence was rejected. The object of strife between the parties was the possession of the *rake*, not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of the latter. The ownership of the coal, therefore, was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking the possession of the coal, still, the defendant could not justify the *wounding* merely in defense of his possession. *Gregory v. Hill, supra*. Unless the plaintiff first attempted forcibly to take the coal, of which there no was proof, I think the evidence was immaterial, and was properly overruled.

New trial denied.

SAME: RECOVERY OF POSSESSION.¹**COMMONWEALTH V. DONAHUE.**

(148 Massachusetts, 529.—1889.)

HOLMES, J. This is an indictment for robbery, in which the defendant has been found guilty of an assault. The evidence for the commonwealth was that the defendant had bought clothes amounting to \$21.55 of one Mitchelman, who called at the defendant's house by appointment for his pay; that some discussion arose about the bill, and that the defendant went up stairs, brought down the clothes, placed them on a chair and put \$20 on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money, and put it in his pocket, and told the defendant he owed him \$1.55, whereupon the defendant demanded his money back, and, on Mitchelman refusing, attacked him, threw him on the floor, and choked him, until Mitchelman gave him a pocket-book containing \$29. The defendant's counsel denied the receiving of the pocket-book, and said that he could show that the assault was justifiable under the circumstances of the case, as the defendant believed that he had a right to recover his own money by force, if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions, and declined to introduce evidence. The jury were instructed as stated, and found the defendant guilty.

On the evidence for the commonwealth, it appeared, or, at the lowest, the jury might have found, that the defendant offered the \$20 to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, since Mitchel-

¹ The authorities differ as to the right to use force to recover possession of land, some holding that the owner, using only reasonable force to regain possession, is not civilly, though he may be criminally liable therefor. *Low v. Elwell*, 121 Mass. 309; *Lambert v. Robinson*, 162 Mass. 34; *Souter v. Codman*, 14 R. I. 119; *Dustin v. Cowdry*, 23 Vt. 631. In New York, the owner is civilly as well as criminally liable. *Bliss v. Johnson*, 73 N. Y. 529; *Bristol v. Burr*, 120 N. Y. 427.

man, of course, whatever the sum due him, had no right to that particular money except on the conditions on which it was offered (*Com. v. Stebbins*, 8 Gray, 492), he took the money wrongfully from the possession of the defendant; or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud (*Com. v. Devlin*, 141 Mass. 423, 431; *Chiffer's Case*, T. Raym. 275, 276; *Reg. v. Thompson*, Leigh & C. 225; *Reg. v. Slowly*, 12 Cox, Crim. Cas. 269; *Reg. v. Rodway*, 9 Car. & P. 784; *Rex v. Williams*, 6 Car. & P. 390; 2 East, P. C. c. 16, §§ 110–113). See *Reg. v. Cohen*, 2 Denison, Cr. Cas. 249, and cases *infra*. The defendant made a demand, if that was necessary,—which we do not imply,—before using force. *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, 8 Q. B. (N. S.) 197; *Com. v. Clark*, 2 Metc. (Mass.) 23, 25; and cases *infra*.

It is settled by ancient and modern authority that under such circumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding, or the employment of a dangerous weapon. *Com. v. Lynn*, 123 Mass. 218; *Com. v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Baxt. 608; *State v. Elliot*, 11 N. H. 540, 545; *Rex v. Milton*, Moody & M. 107; Y. B. 9 Edw. IV. 28, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Hen. VI. 27, pl. 9. See *Seaman v. Cuppledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac. 224, Yelv. 157, 1 Brown & G. 215; *Shingleton v. Smith*, Lutw. 1481, 1483; 2 Inst. 316; Finch, Law, 203; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Comm. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. *Baldwin v. Hayden*, 6 Conn. 453; Y. B. 19 Hen. VI. 31, pl. 59; *Rogers v. Spence*, 13 Mees. & W. 571, 581; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Comm. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. (N. S.) 713, 12 C. B. (N. S.) 501, 13 C. B. (N. S.) 844, 11 H. L. Cas. 621; *Com. v. McCue*, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgeden v. Hubbard*, 18 Vt. 504. See *Johnson v. Perry*, 56 Vt. 703. On the other

hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas. 81. See *Barnes v. Martin*, 15 Wis. 240; *Andre v. Johnson*, 6 Blackf. 375; *Davis v. Whitridge*, 2 Strob. 232; 3 Bl. Comm. 4.

It is unnecessary to decide whether in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain, if he could, even if he knew that Mitchelman still had the identical money upon his person.

If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law. *Com. v. Clark*, 2 Metc. (Mass.) 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and, coupling that statement with the defendant's offer of proof, and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed, to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like *Reg. v. Boden*, 1 Car. & K. 395, 397; *Reg. v. Hemmings*, 4 Fost. & F. 50; *State v. Hollyway*, 41 Iowa, 200. Compare *Com. v. Stebbins*, 8 Gray, 492; *Com. v. McDuffy*, 126 Mass. 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. *State v. Nash*, 88 N. C. 618. The facts were as the defendant believed them to be.

Exceptions sustained.

KIRBY v. FOSTER.

(17 Rhode Island, 437.—1891.)

STINESS, J. The plaintiff was in the employ of the Providence Warehouse Co., of which the defendant, Samuel J. Foster, was the agent, and his son, the other defendant, an employee. A sum of fifty dollars belonging to the corporation had been lost, for which the plaintiff, a bookkeeper, was held responsible, and the amount was deducted from

his pay. On January 20, 1888, Mr. Foster handed the plaintiff some money to pay the help. The plaintiff, acting under the advice of counsel, took his money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to Mr. Foster, saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants then seized the plaintiff and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, for which this suit is brought. The jury having returned a verdict for the plaintiff, the defendants petition for a new trial on exceptions to the rulings and refusals to rule of the presiding justice. It is unnecessary to repeat the several exceptions, since they involve substantially but one question, viz.: whether the defendants were justified in the use of force upon the plaintiff to retake the money from him. As the defendants only pleaded the general issue, all requests relating to justification might properly have been refused on that ground. 1 Chitty on Pleading, 501; 2 Greenleaf on Evidence, s. 92. This case, however, having been tried upon the defence of justification, we will consider the exceptions as though that defence had been pleaded.

The defendants contend that the relation of master and servant subsisted between the plaintiff and Samuel J. Foster, the manager of the warehouse, whereby possession of money by the plaintiff was constructively possession by the manager, acting in behalf of the company; and that the money having been delivered to the plaintiff for the specific purpose of paying the help, his conversion of it to his own use was a wrongful conversion amounting to embezzlement, which justified the defendants in using force in defence of the property under their charge. Unquestionably, if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny, when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defence and recapture involves two things: *First*, possession by the owner; and, *second*, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater

consequence than a private right or an occasional hardship. Inadequacy of remedy is a frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defence of one's possession and the right of recapture as against a mere wrong-doer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation, the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. Having thus appropriated the money to himself, it is urged that the act amounted to embezzlement, which justified the intervention of the defendants to prevent the consummation of the crime. We do not think this is so. The plaintiff stated what he had done, and the grounds upon which he claimed the right to do it, handing back the balance above what was due him. A controversy followed. He started to go out, but was stopped by the defendants, and then the assault took place. The sincerity of the plaintiff's belief that he had a right to retain the money is unquestionable. Hence, as stated in *Cluff v. Mutual Benefit Life Insurance Co.*, 13 Allen, 308, cited by the defendants, even a forcible taking of property, "if done under an honest claim of right, however ill founded, would not constitute the crime of robbery or larceny; because, where a party sincerely, though erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes."

In the most favorable view of the case for the defendants, the plaintiff having obtained the money by no crime, misrepresentation, or violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in *Bliss v. Johnson*, 73 N. Y. 529: "The general rule is, that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession for the purpose of regaining possession, although the possession is wrongfully withheld." See, also, *Harris v. Marco*, 16 S. Car. 575; *Barnes v. Martin*, 15 Wisc. 240; *Andre v. Johnson*, 6 Blackf. Ind. 375. In *Commonwealth v. McCue*, 16 Gray, 226, it was held that an owner of cattle, which had been taken up by one who claimed to be a field driver had no right to commit an assault in retaking his prop-

erty, even though the complainant acted only as an officer *de facto* and demanded illegal fees.

But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy.

The defendants cite the following cases, which, it will be seen, are plainly distinguishable from the case at bar. *Blades v. Higgs*, 10 C. B. N. S. 713. This was on demurrer to a plea, which set up that the plaintiff had possession, wrongfully and against the will of the owner, of certain property, which the plaintiff was about to carry away. The plea was held to be a good justification for necessary force, upon the assumed ground that the defendants had actual possession of the chattels, which the plaintiff took against their will. In *Johnson v. Perry*, 56 Vt. 703, and *Gyre v. Culver*, 47 Barb. S. C. 592, there was no claim of right on the part of the plaintiff to the property he had taken. In *Hodgeden v. Hubbard*, 18 Vt. 504, the plaintiff obtained the property by false representations. *Baldwin v. Hayden*, 6 Conn. 453, apparently sustains the defendant's contention that an owner has a right to retake property intrusted to another, if he is about to carry it away; yet it does not appear in that case that the defendant made any claim of title to the paper in question, only that he supposed he had permission to take it away. *State v. Elliott*, 11 N. H. 540, is in the same line, but extremely guarded in expression. It appears to have been a very slight assault, which the court was quite willing to justify, without consideration of authorities. But the court said the right of recapture of property is far more limited than that of its defense, and recognizes the question whether the person removing it is a mere wrong-doer, as one of the questions to be determined.

The defendants object to the charge of the court, that where a person has come into the peaceable possession of a chattel from another, the latter has no right to retake it by violence, whether the possession is lawful or unlawful, upon the ground that this rule would prevent the recapture of property obtained by trickery or fraud. The instruction must be considered not as an abstract proposition, but with reference to the case before the jury. Nothing appeared to show that the money had been procured by misrepresentation, trickery, or fraud. It was delivered to the plaintiff voluntarily, in the usual course of business. True, under the advice of a lawyer whom he had consulted, the plaintiff had previously determined to apply the money to his own payment when he should receive it; but this did not make the delivery itself fraudulent, nor did his intent to assert what he believed to be his right make that intent criminal. We think, therefore, with reference to the case as it

stood, there was no error in the charge as given, nor in the refusals to charge as requested.

Exceptions overruled.

ANTHONY V. HANEYS.

(8 Bingham, 186.—1832.)

TRESPASS. The declaration stated, that defendants, on the 8th of November, 1830, and on divers other days, etc., between that day and the commencement of the suit, broke and entered plaintiff's close at Much Haddon, in the county of Hertford; and with feet in walking trod down, trampled upon, and consumed and spoiled plaintiff's grass, . . . and then and there placed . . . 5,000 bricks, etc., in and upon the said close, . . . , pulled down, prostrated and destroyed one barn, three out-houses, and three lean-tos of plaintiff, . . . and carried away the materials of the said barn, out-houses and lean-tos.

Plea, . . . that before and at the said times when, etc., in the said first count mentioned, the defendant, John Haney, was the owner of and entitled unto a certain barn, three out-houses, and three lean-tos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5,000 planks of wood, 5,000 joists, 5,000 ties, 5,000 girders, 5,000 pieces of wood, 5,000 loads of timber, and 1,000 weight of iron, of great value, to wit, of the value of £200, then respectively standing and being in and upon the said close of the said plaintiff, in which, etc.; wherefore the said defendant, John Haney, in his own right, and James Haney and Joseph Harding, as the servants of the said John Haney, by his command, at the said several times when, etc., in the said first count mentioned, entered into and upon the said close in which, etc., in order to pull down, remove, take, and carry away the said barn, out-houses, and lean-tos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, out-houses, and lean-tos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, wagons, and other carriages drawn by the said cattle, from and out of the said close in which, etc., . . . doing no unnecessary damage to the said plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid, . . . Demurrer and joinder.

TINDAL, C. J. The second plea in this case cannot be supported in law; and it is bad on a ground much short of that which has been argued

to-day. The defendant Haney states, as the ground of his right for entering the plaintiff's close, that he was the owner of a certain barn, three out-houses, three lean-tos, and certain chattels standing and being on the plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, lean-tos, etc., were standing on the close in the ordinary acceptation of the term, that is, were affixed to the freehold; and the rather because the defendant admits that he dug up the soil of the plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to get what he claimed as his own. That would be to take the law into his own hands, and to render an action of ejectment unnecessary. If so, the plea, which is bad in part, is, under the common rule, bad for the whole, and judgment must be given for the plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the defendant has shown on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of another. Here the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter. So in the case of a tree which is blown down, or through decay falls into the ground of a neighbor, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken, and the owner pursues to obtain possession, the principle is laid down by Blackstone, 3 Com. 4, who says, "As the public place is a superior consideration to any one man's private property, and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife or bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the

grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law." A case has been suggested in which the owner might have no remedy where the occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.

*Judgment for plaintiff.*¹

PATRICK V. COLERICK.

(3 Meeson & Welsby, 483.—1838.)

TRESPASS for breaking and entering the plaintiff's close, and with feet in walking, etc., and with horses, etc., and with the wheels of carts, etc., subverting the soil, and seizing and carrying away divers large quantities of straw, etc.

The defendant alleged that the plaintiff had wrongfully taken the said straw from the defendant's possession; that the defendant made fresh pursuit after his said straw; quietly and peaceably entered said close; and did then and there quietly and peaceably retake his said straw, and load same upon his wagons, and carry same away as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff. Demurrer and joinder.

PARKE, B. The passage in Blackstone, as to the right of recaption, applies to the case where the goods are placed on the ground of a third party. All the old authorities say, that where a party places the goods upon his own close, he gives to the owner of them an implied license to enter for the purpose of recaption. There are many authorities to that effect in Viner's Abridgment. Thus, in title "Trespass," (1) a, it is said, "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act." The reason of the judgment of the Court of Common Pleas is, that it was not shown who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it be shown that they came there by the plaintiff's act.

LORD ABINGER, C. B., BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the defendant.

¹ Concurring opinions by PARK, BOSANQUET and ALDERSON, JJ., omitted.

RIGHT OF RECOVERY BY PARTY USING EXCESSIVE FORCE.**ELLIOTT V. BROWN.**

(2 Wendell, 497.—1829.)

ERROR from the New York Common Pleas.

Brown sued Elliott for an assault and battery. Plea not guilty, and subjoined notice of *son assault demesne*.

At the trial, the plaintiff proved that the defendant, a small, elderly man, struck him in the face, or put his fist in his face; whereupon, as appeared by the evidence on the part of the defendant, the plaintiff, a large, powerful man, threw the defendant violently to the ground, doing him serious injury. The testimony was conflicting as to who struck the first blow.

The judge charged the jury that they must determine who commenced the affray by committing the first personal violence; that the defendant had been much hurt, but yet the inquiry must be, who committed the first act of violence; and if they found that it was the defendant, their verdict must be for the plaintiff; but that in such case the injuries sustained by the defendant ought to be considered in mitigation of damages. Counsel for the defendant requested the court to charge the jury, that though they should believe that the defendant had put his fist in the plaintiff's face, yet if the plaintiff provoked it and followed it up by unnecessary violence, he became a trespasser, and the defendant would stand justified. The judge replied, that if one man commences an assault upon another, and he in defending himself does violence to the person assaulting him, not necessary to his own defense, he thereby gives a cause of action for such violence on his part, yet he loses not his own cause of action, which accrued to him from the first assault and battery which had been committed on him; to which the defendant excepted.

The jury, after retiring, returned and requested to be instructed what amount of damages would carry costs. The judge told them their inquiry ought to be, whether or not an assault and battery had been committed by the defendant upon the plaintiff; if they found that it had not been committed, their verdict should be for the defendant, otherwise for the plaintiff, to whom they should award such damages as the wrong required, without reference to the costs; that it was his duty to give them all proper information in matters of law necessary to aid them in the determination of the facts, but that the information sought was not necessary for that purpose. The defendant again excepted.

By the Court, SAVAGE, CH. J. The first question is an important one,

and it is rather strange that no case is to be found, as far as my researches have extended, where the point has been adjudicated. It has been decided by this court, though I cannot find the decision reported, that there cannot be a recovery by both parties in cross-action. The party who first recovers, may plead that recovery in the suit against himself for the same affray. Had the parties been reversed in this case, upon the same testimony which was given, the court would no doubt have charged the jury, that although Elliott might have committed the first assault, yet if Brown used more violence than was necessary to his own defense, he became a trespasser and was liable to pay damages to the plaintiff. Such unquestionably is the law. It was so laid down by Holt, Ch. J., in *Cockroft v. Smith*, Salk. 642, where he says: "That for every assault, he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea (*son assault demesne*) was, that he struck in his own defense." The facts of the case are not given, but from what appears in 1 Ld. Raym. 177, it was an action for mayhem, in biting off the plaintiff's finger, and the first assault by the plaintiff was tilting the form on which the defendant sat, whereby the defendant fell; or, according to 11 Mod. 43, in a scuffle the plaintiff ran his finger towards the defendant's eyes, whereupon the defendant bit off a joint. It was held in that case a good defense. But the principle is laid down by the court, though they say contrary to common practice, that for a small assault there must not be an unequal return; but the question should be, what was necessary for a man's defense; not who struck first. This case of *Cockroft v. Smith* is referred to by all subsequent writers.

The same principle was recognized in South Carolina, in the case of *The State v. Wood*, 1 Bay, 351. The defendant was indicted for an assault and battery on a woman. He proved that she struck him first with a cowskin, whereupon he gave her several severe blows with a large stick and left her speechless on the ground. The court directed a verdict against the defendant. They agree that the general rule of law is, that it is a justification to the defendant that the prosecutor or plaintiff gives the first blow; but the resistance ought to be in proportion to the injury offered. Where a man disarms the aggressor, or puts it out of his power to do further injury, he ought to desist from further violence; and if he commits any further outrage, he becomes the aggressor. The case in Salk. 642, is cited as sound law. So the master of a vessel has a right to use proper chastisement for disobedience of orders; but if it be excessive, and out of proportion to the offense, he becomes a trespasser. 15 Mass. R. 347, 365. And so in all cases where the right of chastisement is given by law, if unnecessary severity is used, an action or an indictment lies. The plaintiff in this case had no greater rights than those who are permitted by law to chastise others under their control. Admitting that the defendant gave the first blow, this authorized the plaintiff

to resist force by force, and to disarm or disable his adversary; but it did not authorize an athletic, gigantic man to crush almost to death a little, feeble old man. There can be no manner of doubt, then, that had Elliott sued Brown, he would have been entitled to recover exemplary damages; and from former decisions, should this recovery be sustained, it is a bar to any action which Elliott may bring. Can the law tolerate such injustice? How can the plaintiff be in any better situation in the eye of the law and of reason by being plaintiff, than he would be in were he the defendant? If the law is as stated in the court below, any person who is assaulted ever so lightly, and that too upon his own provocation, may turn upon his assailant and beat him as much as he pleases without killing him, and yet recover damages from the man whom he has thus abused. The law is not chargeable with such injustice. It is true that both parties may be guilty of a breach of the peace, and may be liable to punishment by indictment at the suit of the people, whose laws they have both offended; but a civil action cannot surely be sustained by each of them against the other. The judge should have told the jury, that although the defendant might have given the first blow, yet if the plaintiff had used not only more force than was necessary for self-defense, but had unnecessarily abused the defendant, that then he was not entitled to recover damages; but was liable to pay damages, should Elliott prosecute him.

On the other point, the judge's direction to the jury was strictly correct. It is the duty of the jury to ascertain what damages the plaintiff has sustained; and also how much the defendant ought to be punished; and if the jury consider the costs as part of the amount which the defendant should pay, and wish to give no greater damages than barely enough to carry costs, or to give such a sum as will not carry costs, they have a right so to do. I think, therefore, it would have been proper to have given the jury the information they wanted. But without deciding whether the refusal of the judge to state the law relating to costs to the jury was erroneous, I am of opinion that the judgment should be reversed on the first point.¹

¹ See *Deagan v. Weeks*, 67 App. Div. 410.

DOLE V. ERSKINE AND CHASE.

(35 New Hampshire, 503.—1857.)

TRESPASS for assault and battery.

Chase pleaded not guilty, and that, on the day of the alleged trespass, the plaintiff and defendant Erskine were engaged in fighting and breaking the peace, and that he interfered to prevent such breach of the peace, using no more force than necessary for that purpose.

Erskine pleaded not guilty, and that plaintiff commencing the assault he defended himself, using no more force than necessary, and that although he did assault the plaintiff, yet the plaintiff in defending himself used unnecessary and excessive force.

The commissioner, to whom the case was referred, at the February term, 1856, reported that Chase was not guilty; that Erskine committed the first assault; and that the plaintiff used more force than necessary, in repelling Erskine's first assault.

At the September term, 1856, in an action by Erskine against Dole, for the same trespass set forth in the present case, judgment in favor of Erskine was entered upon a verdict. In that action the court instructed the jury that if they found Erskine committed the first assault, he was entitled to recover damages only for the excessive force used in repelling such assault.

It was agreed that if the Supreme Court should determine in favor of Dole in this action, the cause should be remitted to the Common Pleas for further proceedings, with right to the defendants to controvert the findings of the commissioner, etc.

EASTMAN, J. The only reported decision that we have been able to find, where the question presented was the same as that raised in the case before us, is that of *Elliott v. Brown*, 2 Wendell, 499. In that case it was held that the party first attacked, in a personal encounter between two individuals, is not entitled to maintain an action for an assault and battery if he uses so much personal violence towards the other party, exceeding the bounds of self-defense, as could not be justified under the plea of *son assault demesne*, were he a party defendant in a suit.

If the rule laid down in that case is sound law, this suit cannot be sustained, for the commissioner to whom the action was referred has reported, that, although the defendant committed the first assault, yet the plaintiff used more force than was necessary or justifiable in repelling that assault.

The ground upon which the decision in *Elliott v. Brown* was placed, is, that there cannot be a recovery in cross-actions for the same affray,

but that the party who first recovers may plead that recovery in a suit against himself. No authority is cited to sustain that position, and it appears to us that it is not well founded. If an assault is made upon a party, it may be repelled by force sufficient for self-defense, even to the use of violence; and if no more force is used than what is necessary to repel the attack, the party assaulted may, under the plea of *son assault demesne*, show the facts and have judgment. To this extent the law is well settled. 2 Greenl. Ev. § 95, and authorities cited. If the affray stops there, the party first assailed, being justified in what he has done in self-defense, may have his action for the injury that he has received. He has himself done nothing more than what the law permits; but the other party, in commencing and following up the assault, is liable not only for a breach of the peace, but for all the personal injuries that he has inflicted.

But if the person assaulted uses excessive force, beyond what is necessary for self-defense, he is liable for the excess, and the facts may be shown under the replication of *de injuria*. *Curtis v. Carson*, 2 N. H. 539; *Hannen v. Edes*, 15 Mass. 349; *Cockcroft v. Smith*, Salk. 642; Bul. *Nisi Prius*, 18.

Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defense he has committed no breach of the peace, and done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given, wiped out by the excessive castigation which he receives from the other party, then each party may sustain an action; the one that is assailed, for the assault and battery first committed upon him, and the assailant, for the excess of force used upon him beyond what was necessary for self-defense.

We think that these are not matters of set-off; that the one cannot be merged in the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed; the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time

that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then for the first time becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after?

In *Elliott v. Brown*, it is conceded that both parties may be indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear.

We arrive then at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one in the other, but that each party may maintain an action for the injury received; the assailed party, for the assault first committed upon him, and the assailant for the excess above what was necessary for self-defense.

This rule, it appears to us, will do more justice to the parties and more credit to the law than the other, for by it the party who has commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist.

We think, also, that the view of the case which we have taken derives much strength from the fact that no precedent can be found of any pleading sustaining the defendant's views. It is remarkable that such a plea cannot be found in any of the books, if the defense has ever been regarded by the courts as good law.

* * * * *

Our opinion therefore is, that, upon the facts stated, the plaintiff would be entitled to judgment. But according to the provisions of the transfer, the case must be sent to the Common Pleas for further proceedings.

PROVOCATION: EFFECT UPON DAMAGES.

GOLDSMITH v. JOY.

(61 Vermont, 488.—1889.)

TRESPASS for assault and battery upon plaintiff's intestate, who at the time of the affray was suffering from Bright's disease and subsequently died of it. It was claimed that his death was materially hastened by the assault.

In instructing the jury, the court, among other things, said: "Mere words made use of by one person to another are no legal excuse whatever for the infliction of personal violence. It makes no difference how violent the language used may be, no man has the right to use personal violence upon another when he is induced to simply by the use of words. That is no defense to the action. But when you come to the question of whether a particular case is one that deserves the awarding of exemplary damages, then you are to consider all the circumstances in the case, the provocation, if any, that the defendant had, and everything that is calculated on the one hand to aggravate his act, and on the other hand to palliate his act, are to be considered.

'As I have already said on the main question of compensatory damages, there is no defense here whatever. No matter what was said, no matter how much provocation the defendant had, he is bound to answer for the compensatory damages at any event. As to exemplary damages, in the exercise of a wise discretion you will not allow them unless you are satisfied that the act of the defendant was high-handed, wanton and inexcusable, and in determining that question you are to take into view all the provocation that he had.'" Verdict and judgment for plaintiff. Exceptions by defendant.

TYLER, J. The court instructed the jury that there was no defense to the claim for actual or compensatory damages; that words were no legal excuse for the infliction of personal violence; that no matter how great the provocation, the defendant was bound in any event to answer for these damages.

It is a general and wholesome rule of law that whenever, by an act which he could have avoided and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured.

The question whether provocative words may be given in evidence under the general issue to reduce actual damages in an action of trespass for an assault and battery has undergone wide discussion.

The English cases lay down the general rule that provocation may mitigate damages. The case of *Frazer v. Berkeley*, 7 C. & P. 789, is often referred to, in which Lord ABINGER held that evidence might be given to show that the plaintiff in some degree brought the thing upon himself; that it would be an unwise law if it did not make allowance for human infirmities; and if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation.

TINDAL, Ch. J., in *Perkins v. Vaughan*, 5 Scott's N. R. 881, said: "I think it will be found that the result of the cases is that the matter cannot be given in evidence where it amounts to a defense, but that where it does not amount to a defense, it may be given in mitigation of damages." *Linford v. Lake*, 3 H. & N. 275; Addison on Torts, § 1393, recognizes the same rule.

In this country, 2 Greenl. on Ev. § 93, states the rule that a provocation by the plaintiff may be thus shown if so recent as to induce a presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. The earlier cases commonly cited in support of this rule are *Cushman v. Ryan*, 1 Story, 100; *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 241; and *Maynard v. Berkeley*, 7 Wend. 560. The Supreme Court of Massachusetts has generally recognized the doctrine that immediate provocation may mitigate actual damages of this kind. *Mowry v. Smith*, 9 Allen, 67; *Tyson v. Booth*, 100 Mass. 258; *Bonino v. Caledonio*, 144 Mass. 299. It is also said in 2 Sedgwick (7th ed.), 521: "If, making due allowance for the infirmities of human temper, the defendant has reasonable excuse for the violation of public order, then there is no foundation for exemplary damages, and the plaintiff can claim only compensation. It is merely the corollary of this, that when there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be and is, practically, mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure."

In *Burke v. Melvin*, 45 Conn. 243, PARK, Ch. J., held that the whole transaction should go to the jury. "They could not ascertain what amount of damages the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a provoked and an unprovoked assault is obvious. The latter would deserve punishment beyond the actual damages, while the damages in

the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself." In *Bartram v. Stone*, 31 Conn. 159, it was held that in an action for assault and battery the defendant might prove, in mitigation of damages, that the plaintiff, immediately before the assault, charged him with a crime, and that his assault upon the plaintiff was occasioned by "sudden heat," produced by the plaintiff's false accusation. See also *Richardson v. Hine*, 42 Conn. 206.

In *Kiff v. Youmans*, 86 N. Y. 324, the plaintiff was upon defendant's premises for the purpose of committing a trespass, and the defendant assaulted him to prevent the act, and the only question was whether he used unnecessary force. DANFORTH, J., said: "It still remains that the plaintiff provoked the trespass, was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass, and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely to increase them."

In *Robinson v. Rupert*, 23 Pa. St. 523, the same rule is adopted, the court saying: "Where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient to entirely justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages."

In *Ireland v. Elliott*, 5 Ia. 478, the court said: "The farthest that the law has gone, and the farthest that it can go, whilst attempting to maintain a rule, is to permit the high provocation of language to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages."

In *Thrall v. Knapp*, 17 Ia. 468, the court said: "The clear distinction is this: *contemporaneous* provocation of words or acts are admissible, but *previous* provocations are not, and the test, is, whether, 'the blood has had time to cool.' . . . The law affords a redress for every injury. If the plaintiff slandered defendant's daughters, it would entirely accord with his natural feeling to chastise him; but the policy of the law is against his right to do so, especially after time for reflection. It affords a peaceful remedy. On the other hand the law so completely disfavors violence, and so jealously guards alike individual rights and the public peace that, if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little *diachylon*, yet he shall have his action." Per Lord Holt, 2 Ld. Raym. 955. The reasoning of the court seems to make against this rule that provocations such as happen at the time of the assault may be received in evidence to reduce the amount of the plaintiff's recovery.

In *Moreley and Wife v. Dunbar*, 24 Wis. 183, DIXON, Ch. J., held,

that notwithstanding what was said in *Birchard v. Booth*, 4 Wis. 85, circumstances of provocation attending the transaction, or so recent as to constitute a part of the *res gestæ*, though not sufficient entirely to justify the act done, may constitute an excuse that may mitigate the actual damages; and, where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal. But in *Wilson v. Young*, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages only so far as these should be given for injury to the feelings, DIXON, Ch. J., however, adhering to the rule in *Moreley v. Dunbar*, that it might go to reduce all compensatory damages; but in *Fenelon v. Butts*, 53 Wis. 344, and in *Corcoran v. Harron*, 55 Wis. 120, it was clearly held that personal abuse of the assailant by the party assaulted may be considered in mitigation of *punitive*, but not of *actual* damages, which include those allowed for mental and bodily suffering; that a man commencing an assault and battery under such circumstances of provocation is liable for the actual damages which result from such assault.

In *Donnelly v. Harris et al.*, 41 Ill. 126, the court instructed the jury that words spoken might be considered in mitigation of damages. WALKER, Ch. J., in delivering the opinion of the Supreme Court remarked: "Had this modification been limited to exemplary damages it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then say they may mitigate all but nominal damages, would, we think, be doing by indirection what has been prohibited from being done directly. To give to words this effect, would be to abrogate, in effect, one of the most firmly established rules of the law." See also *Ogden v. Claycomb*, 52 Ill. 366. In *Gizler v. Witzel*, 82 Ill. 322, the court said in reference to the charge of the court below: "The third instruction tells the jury among other things that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense."

In *Norris v. Casel*, 90 Ind. 143, this precise question was not raised, but the court said in reference to the instructions of the court below, that the first part of the charge that the provocation by mere words, however gross and abusive, cannot justify an assault was correct, and that a person who makes such words a pretext for committing an assault, commits thereby not only a mere wrong, but a crime, and the person so

assaulted is not deprived of the right of reasonable self-defense, even though he used the insulting language to provoke the assault against which he defends himself; but whatever may have been his purpose in using the abusive language, it cannot be made an excuse for the assault.

Johnson v. McKee, 27 Mich. 471, was a case very similar to the one at bar, and was given to the jury under like instructions. The Supreme Court said: "In regard to provocation, the court charged in effect, that if plaintiff provoked defendant, and the assault was the result of that provocation, he could recover nothing beyond his actual damages and outlays, and would be precluded from claiming any damages for injured feelings or mental anxiety. In other words he would be cut off from all the aggravated damages allowed in cases of willful injury, and sometimes loosely called exemplary damages. As there is no case in which a party who is damaged and is allowed to recover anything substantial, cannot recover his actual damages, the rule laid down by the court was certainly quite liberal enough, and if any one could complain it was not the defendant."

The court said in *Prentiss v. Shaw*, 56 Me. 712: "We understand the rule to be this: a party shall recover as a pecuniary recompense the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. . . . If the assault was illegal and unjustified, why is not the plaintiff in such case entitled to the benefit of the general rule, before stated, that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act. . . . Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for a reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, . . . must not the defendant be held to pay the full value of the horse thus rendered useless?" The learned judge admits that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show, on one side, aggravation, and on the other, mitigation of the damages claimed, but he holds the law to be that mitigating circumstances can only be set against exemplary damages, and cannot be used to reduce the actual damages directly resulting from the defendant's unlawful act.

In a learned article on damages in actions *ex delicto* 3 Am. Jur. 287, it is said: "If the law awards damages for an injury, it would seem absurd, even without resorting to the definition of damages, to say that they shall be for a part only of the injury."

"It is a reasonable and a legal principle that the compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it

in all cases proper for a legal indemnification in the shape of damages." Ch. J. SHIPPEN, 4 Dall. 207.

Jacobs v. Hoover, 9 Minn. 204, *Cushman v. Waddell*, Baldwin, 57, and *McBride v. McLaughlin*, 5 Watts, 375, are strong authorities in support of the rule that provocative language used by the plaintiff at the time of the battery should be given in evidence only in mitigation of exemplary damages, and that unless the plaintiff has given the defendant a provocation amounting in law to a justification he is entitled to receive compensation for the actual injury sustained.

If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum and thus practically justify an assault and battery. But why under this rule may they not fully justify? If in one case, the provocation is so great that the jury may award only nominal damages, why, in another, in which the provocation is far greater, should they not be permitted to acquit the defendant and thus overturn the well-settled rule of law, that words cannot justify an assault. On the other hand if words cannot justify they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words and therefore, though he struck and injured the plaintiff, he was only partly in the wrong and should pay only part of the actual damages.

If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question, but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another, and certainly a person in the full possession of his faculties should be held liable for his actual injuries to another unless done in self-defense or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act. It is certainly in accordance with what this court held in *Howland v. Day & Dean*, 56 Vt. 318, that, "The law abhors the use of force either for attack or defense, and never permits its use unnecessarily."

Exemplary damages are not recoverable as matter of right, but as was stated by WHEELER, J., in *Earl and Wife v. Tupper*, 45 Vt. 275, they are given to stamp the condemnation of the jury upon the acts of the defendant on account of their malicious or oppressive character. *Boardman v. Goldsmith*, 48 Vt. 403, and cases cited; *Mayne on Dam.* 5865; *Voltz v. Blackmer*, 64 N. Y. 440.

The instructions to the jury upon this branch of the case were in substantial accordance with the law as above stated. As exemplary damages were awardable in the discretion of the jury, the charge was also correct that the influence of an example in a case of this kind depended on the character and standing of the parties involved.

*We find no error in the charge, and the judgment is affirmed.*¹

¹ See also *Scott v. Central Park, etc., R. R. Co.*, 53 Hun, 414; *Kosters v. Brooklyn, etc., Co.*, 10 Misc. 18, affirmed without opinion in 151 N. Y. 630.

FALSE IMPRISONMENT

WHAT CONSTITUTES.¹

BIRD v. JONES.

(7 Adolphus & Ellis [N. S.], 742.—1845.)

ACTION of trespass for an assault and false imprisonment. Pleas—as to the assault, *son assault demesne*; as to the imprisonment, that the plaintiff, before the imprisonment, assaulted the defendant, upon which the defendant gave him into custody. Replication—*de injuria* to each plea. Verdict for the plaintiff. Defendant obtained a rule *nisi* for a new trial, on the ground of misdirection of the chief justice at the trial, the jury being instructed that an imprisonment had taken place before the plaintiff assaulted the defendant.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed: and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my brother PATTERSON, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists.

This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows:

¹ MALICE AND PROBABLE CAUSE.—The gravamen of the wrong is unlawfulness of detention. “At common law, trespass, not case, lay for false imprisonment. Accordingly, liability proceeded, not on the theory of evil motive or of negligence, but of acting at peril. Therefore, to entitle the plaintiff to recover, it is not necessary for him to allege or prove either malice or want of probable cause.” Jaggard on Torts, I. 418.

“Malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggravate his damage, but have nothing whatever to do with his cause of action.” *Marks v. Townsend*, 97 N. Y. 590. See also *Burns v. Erben*, 40 N. Y. 463.

A part of a public highway was inclosed, and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant: but after a struggle, during which a momentary detention of his person took place, he succeeded in climbing over the enclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go: but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts: and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In *Com. Dig. Imprisonment* (G), it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482; *Hobert & Stroud's Case*, Cro. Car. 210. But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In

both books, the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord COKE is commenting on the statute of Westminster 2d (1 Stat. 13, Ed. I, c. 48), "*in priso*na," and says, "Every restraint of the liberty of a free man is an imprisonment, although he be not within the walls of any common prison." The passage in Cro. Car. is from a curious case of an information against Sir Miles Hobert and Mr. Stroud, for escaping out of the Gate House Prison, to which they had been committed by the king. The question was, whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House: the occasion is somewhat singularly expressed in the decision of the court, which was "that their *voluntary* retirement to the close stool" in the Gate House "made them to be prisoners." The resolution, however, in question is this: "that the prison of the King's Bench is not any local prison confined only to one place, and that *every place* where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison."

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge: and I am unwilling to put any extreme case hypothetically: but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is, that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own: but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

PATTERSON, J. This was an action of trespass for an assault and false imprisonment. The pleas were: as to the assault, *son assault*

demesne; as to the imprisonment, that the plaintiff, *before* the imprisonment, assaulted the defendant, wherefore the defendant gave him into custody. The replication was *de injuria* to each plea. This puts in issue, as to the first plea, who committed the first assault; and, as to the second, whether the imprisonment was before or after the assault, if any, committed by the plaintiff. Supposing the defendant to have made the first assault, and the plaintiff to have followed, and such continuous assaulting to have taken place, the plaintiff must succeed on the issue as to the first plea. Supposing a continuous imprisonment to be established, and an assault by the plaintiff, but which took place in trying to escape from that imprisonment, the plaintiff must succeed on the issue as to the second plea. If, on the other hand, the plaintiff did assault the defendant *before* the imprisonment, then he must fail upon the issue as to the second plea, even if his assault was justifiable, because in that case he should have replied such justification, as, for instance, defense of his close, or that he was in the exercise of a right of way which the defendant obstructed, or other matter of justification.

Now the facts of this case appear to be as follows. A part of Hammer-smith Bridge which is ordinarily used as a public footway was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted on passing along the part so appropriated, and attempted to climb over the fence. The defendant, being clerk of the Bridge Company, seized his coat, and tried to pull him back: the plaintiff, however, succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway; but he was told that he might go back into the carriage way, and proceed to the other side of the bridge, if he pleased. The plaintiff would not do so, but remained where he was above half an hour: and then, on the defendant still refusing to suffer him to go forwards along the footway, he endeavored to force his way, and, in so doing, assaulted the defendant; whereupon he was taken into custody.

It is plain from these facts that the first assault was committed by the defendant when he tried to pull the plaintiff back as he was climbing over the fence: and, as the jury have found the whole transaction to have been continuous, the plaintiff would be entitled to retain the verdict which he has obtained on the issue as to the first plea. Again, if what passed *before* the plaintiff assaulted the defendant was in law an imprisonment of the plaintiff, that imprisonment was undoubtedly continuous, and the assault by the plaintiff would not have been *before* the imprisonment as alleged in the second plea, but during it, and in attempting to escape from it: and the plaintiff would, in that case, be entitled to retain the verdict which he has obtained on the issue as to the second

plea. But, if what so passed was not in law an imprisonment, then the plaintiff ought to have replied the right of footway and the obstruction by the defendant, and that he necessarily assaulted him in the exercise of the right, and, not having so replied, is not entitled to the verdict. So that the case is reduced to the question, whether what passed before the assault by the plaintiff was or was not an imprisonment of the plaintiff in point of law.

I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice TINDAL involving this question: but it appears that the plaintiff in that case was compelled to *stay* and hear a letter read to him against his will, which was doubtless a total restraint of his liberty while the letter was read.

I agree to the definition in Selwyn's *Nisi Prius*, title *Imprisonment*, "False imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, etc., or even by forcibly detaining the party in the streets, against his will." He cites 22 Ass. fol. 104, B, pl. 85, per THORPE, C. J. The word there used is "arrest," which appears to me to include "detaining," as Mr. Selwyn expresses it, and not to mean merely the preventing a person from passing.

Upon the whole, I am of opinion that the only imprisonment proved in this case was that which occurred when the plaintiff was taken into

custody *after* he had assaulted the defendant, and that the second plea was made out; I therefore think that the rule for a new trial ought to be made absolute.

*Rule absolute.*¹

HERRING v. BOYLE.

(1 Crompton, Meeson & Roscoe, 377.—1834.)

BOLLAND, B. This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. The facts of the case were these: The plaintiff had been placed by his mother at the school kept by the defendant, and it appeared that she had applied to take him away. The schoolmaster very improperly refused to give him up to his mother, unless she paid an amount which he claimed to be due. The question is, whether it appears upon the Judge's notes that there was any evidence of a trespass to go to the jury? I am of opinion that there was not, and, consequently, that this rule must be discharged. It has been argued on the part of the plaintiff that the misconduct of the defendant amounted to a false imprisonment. I cannot find anything upon the notes of the learned judge which shows that the plaintiff was at all cognizant of any restraint. There are many cases which show that it is not necessary, to constitute an imprisonment, that the hand should be laid upon the person; but in no case has any conduct been held to amount to an imprisonment in the absence of the party supposed to be imprisoned. An officer may make an arrest without laying his hand on the party arrested; but in the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we cannot construe the refusal to the mother, in the boy's absence, and without his being cognizant of any restraint, to be an imprisonment of him against his will; and therefore I am of opinion that the rule must be discharged.

ALDERSON, B. There was a total absence of any proof of consciousness of restraint on the part of the plaintiff. No act of restraint was committed in his presence; and I am of opinion that the refusal in his absence to deliver him up to his mother was not a false imprisonment. My brother PARKE, who heard the rule moved, but who was not present at the argument, concurs in the opinion of the court.

*Rule discharged.*²

¹ Opinions by WILLIAMS, J., and Lord DENMAN, C. J., omitted.

² Opinion by GURNEY, B., omitted. Lord LYNDBURST concurred in the judgment.

JUSTIFICATION: VOID PROCESS, MAGISTRATE.**BLODGETT V. RACE.**

(18 Hun, 132.—1879.)

APPEAL from an order of the County Court of Greene county, denying a motion of the plaintiff for a new trial, made upon a case and exceptions.

On the 7th day of September, 1874, Luther Bailey presented his written complaint on oath to the defendant, wherein he alleged that certain goods of the value of more than \$25 were, on or about the 14th day of April, 1874, at the town of Jewett, Greene county, N. Y., stolen from Division No. 209 of the Sons of Temperance, "and that the said Luther Bailey has probable cause to suspect and does suspect that Frank Blodgett, of the town of Jewett, county of Greene aforesaid, did feloniously steal, take, and carry away the said goods, chattels, and property, in manner and form, and at the time and place, aforesaid." On the same day, at the request of said Bailey, the defendant issued his warrant for the arrest of said Blodgett, the plaintiff herein, upon the charge so made in the aforesaid complaint, without any further evidence. The defendant assumed to act in the premises as a justice of the peace. The warrant was delivered to a constable on the day of its issue, who on the same day arrested the plaintiff thereon, and brought him before the defendant.

This action was subsequently commenced to recover damages for false imprisonment. The plaintiff was nonsuited on the trial.

BOCKES, J. A complaint in writing, charging a criminal offense, although on information and belief only as to the person suspected of having committed it, is sufficient to authorize an investigation before a magistrate, by the examination of witnesses. The magistrate on such complaint may issue subpoenas for witnesses, and has jurisdiction of the subject-matter of the offense charged to have been committed, and may compel the attendance of witnesses by attachment in case of disobedience of the subpoena. *People v. Hicks*, 15 Barb. 153. But before a warrant can lawfully issue for the arrest of the offender the magistrate must have some evidence of his guilt. Facts and circumstances, stated on information and belief only, without giving any sufficient grounds on which to base the belief, are insufficient to confer jurisdiction as to the person. The magistrate must have evidence of probable cause, both as to the commission of the offense and the guilt of the offender, before he can have jurisdiction to cause the arrest. *Comfort v. Fulton*, 39 Barb. 56; *Vredenburg v. Hendricks*, 17 Barb. 179; *Wilson v. Robinson*,

6 How. Prac. 110; *Pratt v. Bogardus*, 49 Barb. 89; *The People v. Hicks*, 15 Barb. 153; *Wells v. Sisson*, 14 Hun, 267; *Carl v. Ayers*, 53 N. Y. 14. It is laid down in Waterman's Notes to Archibold's Criminal Practice and Pleadings (volume 1, 120, marginal page 31) that a warrant cannot be issued against one if his guilt appears only from hearsay and mere rumor, but that a case of probable guilt on the part of the accused must be made out. If facts and circumstances be stated sufficient to call for judicial determination, the magistrate will be protected in his action, and this although he might err in judgment. In such case he is to be fully protected, and the error can only be made available on writ of error or appeal in the action or proceeding in which the error occurred. As to the case in hand, it seems that the warrant was issued on less proof, even, than information or belief, as regards the plaintiff. It was issued on an allegation only of "suspicion and belief" as to the plaintiff's guilt. No fact or circumstance whatever was stated to support the suspicion, even much less to support a conclusion of probable cause against him. The warrant was without jurisdiction; hence afforded the defendant no protection against the charge of an illegal arrest. It is not necessary here to hold that the defendant had no ground for committing the plaintiff after the open public examination was had. It is quite possible, and I think it must be assumed, that there was sufficient evidence given before him to uphold his conclusion to commit. But we do not pass upon that question here. The original arrest directed by the defendant was unauthorized, and the nonsuit herein was therefore improperly granted. This conclusion renders it unnecessary to examine other questions raised in the case. Perhaps it should be further remarked that the case as presented on this appeal does not appear to be one of serious enormity. The good faith of the defendant in issuing the warrant is not denied. The plaintiff was in no way seriously oppressed; on the contrary, was allowed great liberty after his arrest, and during the examination, and finally submitted to be committed rather than give bail, which it seems was easily to be obtained. Whether or not the plaintiff may recover more than nominal damages is for a jury to determine. The order appealed from denying a new trial must be reversed.

LEARNED, P. J., and BOARDMAN, J., concurred.

Order reversed; new trial granted, costs to abide event.

SAME: OFFICER.

SAVACOO V. BOUGHTON.

(5 Wendell, 170.—1830.)

DEMURRER to replication. The plaintiff declared in *trespass* for an assault, battery and false imprisonment. The defendant *pleaded* 1. The general issue; 2. A justification, for that he as a *constable*, by virtue of an execution issued by a *justice of the peace*, on a judgment rendered against the plaintiff in *assumpsit* for \$7.38, arrested the plaintiff and committed him to jail; and 3. A similar justification, setting forth the judgment. The plaintiff *replied* to the second and third pleas *precludi non*, because, previous to the rendition of the judgment set forth by the defendant, the justice who rendered the same *did not issue any process* for the appearance of him (the plaintiff) in the suit in which the judgment was rendered, and that he (the plaintiff) did not direct or authorize the justice *to enter a judgment by confession* in favor of the plaintiffs in the suit, against him (the plaintiff in this cause), nor did the parties in the said suit *appear* before the justice and *join issue*, pursuant to the provisions of the \$50 act; and this, etc., wherefore, etc. To this replication the defendant demurred, and the plaintiff joined in demurrer.

By the Court, MARCY, J. What an officer is required to show to justify himself in the execution of process, is not very clearly settled. There is considerable contrariety of authority on the subject. Where it appears on the face of the process that the court or magistrate that issued it had not jurisdiction of the subject-matter of the suit, or of the person of the party against whom it is directed, it is *void*, not only as respects the court or magistrate and the party at whose instance it is sued out, but it affords no protection to the officer who has acted under it.

Where the court issuing the process has *general jurisdiction*, and the process is regular on its face, the officer is not, though the party may, be affected by an irregularity in the proceedings. Where a judgment is vacated for an irregularity, the party is liable for the acts done under it; but the officer has a protection by reason of his regular writ. 1 Lev. 95; 1 Sid. 272; 1 Strange, 509.

More strictness has been required in justifying under process of courts of limited jurisdiction. Many cases may be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection to the *court*, the *party*, or the *officer* who has executed its process.

This proposition is undoubtedly true in its largest sense where the

proceedings are *coram non judice*, and the process by which the officer seeks to make out his justification shows that the court had not jurisdiction; but I apprehend that it should be qualified where the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause. A court may have jurisdiction of the subject-matter, but not of the person of the parties. If it does not acquire the latter, its proceedings derive no validity from the former. A justice of the peace who should give judgment against a person on a promissory note under fifty dollars, without having issued process of any kind against him, or taken his confession, or without his voluntary appearance in court, would exceed his jurisdiction and be responsible to the party injured; so would the party who procured the court to exceed its authority. But would the officer to whom an execution on this judgment had been issued be liable for acts done in obedience to it, if nothing appeared to show that the justice had not jurisdiction of the defendant's person? This is the question presented by the demurrer in this case.

A distinction has long existed in cases of this kind between the court which exceeds its jurisdiction and the party at whose instance it takes place, and a mere ministerial officer who executes the process issued without authority. This prevails, as we have seen, where a judgment has been obtained in a court of *general jurisdiction* which is subsequently set aside for irregularity. The officer has a protection that the party has not, and that whether the court from which the process issues is a court of general or limited jurisdiction. The right of a mere ministerial officer to justify under his process where the court or party cannot, was considered but not settled in the case of *Smith v. Bancker and others*, decided in 1734. This case is found in 2 Strange, 993; 2 Barnard, 331; Cunn. 89, 127; cases temp. Hardwicke, 62; 2 Kelyn. 144, pl. 123. The reports agree as to the facts, but not as to some points in the opinion of the court. Process was issued from the chancellor's court of Oxford against Smith, who was arrested and committed to jail. The proceedings were instituted without proving what was requisite to give the court jurisdiction. The plaintiff who procured the proceedings, the vice-chancellor who held the court, and the officers who executed the process, were all sued by the defendant Smith for false imprisonment. They united in their plea of justification and were all pronounced guilty. Sir John Strange makes the court say that some of the defendants, namely, the officer and gaoler, might have been excused if they had justified without the plaintiff and vice-chancellor. The court of common pleas in England, in their opinion in the case of *Perkin v. Proctor and Green*, 2 Wilson, 382, say that Lord HARDWICKE denied that such could have been the case. It appears from the case as reported in Hardwicke's Cases, 69, that the point of the officer's liability was not settled; for it

is there said that there was no need of giving a distinct opinion as to the action lying against them.

In *Hill v. Bateman*, 2 Strange, 710, the distinction in favor of the officer is clearly taken. The plaintiff had been fined under the game laws, and was immediately sent to bridewell, without any attempt to levy the penalty upon his goods. This the justice had not a right to do, and was held liable for the imprisonment; but the constable was justified, because the matter was within the jurisdiction of the justice. I understand by this case that the justice had not authority, or in other words, had not jurisdiction, to issue process to commit the party until he had attempted to levy the fine upon his goods; but that after he had made that attempt without success, he had authority to commit him. The process, though unauthorized by the circumstances of the case, would, under other circumstances, have been proper. The issuing of the process was a matter within the justice's jurisdiction. This was enough for the officer's justification. It is further said in this case, if the justice makes a warrant which is plainly out of his jurisdiction, it is no justification. This I understand to mean a warrant which appears on its face to be such as the justice could in no case issue.

The views I have of this case are confirmed by that of *Shergold v. Holloway*, 2 Strange, 1002. There the justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. He was sued for this arrest. The court said the justice had no authority in any instance to proceed by warrant; a summons being the only process. The constable could not therefore justify; he was presumed to know that under no circumstances could a warrant be issued in such a case; therefore the court say there was "no pretense for such a jurisdiction." This decision would doubtless have been different if it had appeared that under any state of things a proceeding by warrant was allowable in such a case; for then the court would assume for the officer's protection that such a state of things did exist, or at least, he should not be required to judge whether it did or not. His duty and his protection both depend upon the assumption that the justice had determined correctly, that those circumstances had happened which called for a warrant, if under any circumstances a warrant could issue. In the case of *Moravia v. Sloper*, Willes, 30, the same distinction which has been noticed in the cases before referred to is still more distinctly put forth. It is there said that "though in case of an officer who is obliged to obey the process of the court, and is punishable if he does not, it may not be necessary to set forth that the cause of action arose within the jurisdiction of the court, it has always been holden, except in one case (the correctness of which Ch. J. WILLES controverted in another part of his opinion), and we are all clearly of opinion that it is necessary in the case of a plaintiff himself."

Lord KENYON says, in the case of *The King v. Danser*, 6 T. R. 242, "a distinction indeed has been made with respect to the persons against whom an action may be brought for taking the defendant's goods in execution by virtue of the process of an inferior court, where the cause of action does not arise within its jurisdiction; the *plaintiff* in the cause being considered a trespasser, but not the *officer* of the court." A court of admiralty, I apprehend, will not be considered a court of general jurisdiction. In relation to its proceedings, BULLER, J., says, in the case of *Ladbroke v. Crickett*, 2 T. R. 653, if upon their face "the court had jurisdiction, the officer was bound to execute the process, and could not examine into the foundation of them; and that will protect him."

There are several cases in our own reports which are supposed to militate against the distinction recognized in the foregoing cases; I apprehend, however, that most of them may be reconciled with those decisions which support it. The decision in the case of *Borden v. Fitch*, 15 Johns. R. 121, was, that a court must not only have jurisdiction of the subject-matter, but of the person of the parties, to render its proceedings valid; and if it has not jurisdiction of the person, its proceedings are absolutely void. It will be recollected that the person who wished to avail himself of the proceedings of the court whose jurisdiction was impeached, was a party to them. There was no occasion or opportunity afforded by that case of considering the question involved in this, the liability of the officer who, as a minister of the court, has executed its process issued on such proceedings.

The case of *Cable v. Cooper*, 15 Johns. Rep. 152, deserves a more minute consideration. One Brown was committed on a *ca. sa.* to the custody of the defendant, who was sheriff of Oneida county, and discharged by a supreme court commissioner under the *habeas corpus* act. The defendant, when prosecuted for the escape of Brown, offered to justify by showing the discharge; but a majority of the court decided that the proceedings under the *habeas corpus* act before the commissioner were *coram non judice* and therefore void. The principle of this decision is, that the power to discharge under that act does not apply to the case of a prisoner who "is convict or in execution by legal process." Brown was in execution by legal process, and this was well known to the defendant, for he had the *ca. sa.* and held the prisoner. Whatever appeared upon the face of the discharge, he knew, if he rightly understood the powers of the commissioner, it was no authority for him to release Brown. If the discharge did not relate to the imprisonment on the *ca. sa.*, it was certainly no authority to release him from confinement thereon; and if it did relate to that imprisonment, then it showed on its face a want of jurisdiction in the officer who granted it; for he could not discharge a person in execution by legal process. Again, the sheriff who held the prisoner might well be regarded as a party to the proceeding before

the commissioner for the discharge; for the *habeas corpus* must have been directed to him, and his return thereto showed the true cause of Brown's detention.

The cases of *Smith v. Shaw*, 12 Johns. R. 257, and *Suydam & Wyckoff v. Keys*, 13 id. 444, have a tendency to obliterate or at least confound the distinction which the other cases seem to me to raise in favor of the officer. I am free to confess that the reasoning and conclusion of the judge who delivered the dissenting opinion in the former case are more satisfactory to me than those contained in the opinion adopted by a majority of the court. Smith, in that case, was not looked upon in the light of a mere ministerial officer. He was superior in authority to Hopkins and Findley, who had illegally imprisoned the plaintiff, and his liability was put expressly upon the ground that he had ratified and confirmed their acts, and exercised other restraint over the plaintiff than merely continuing the original imprisonment. If he had only refused to discharge the prisoner, he would not, as is strongly intimated by the court, have been held liable. This case was not considered by the court as presenting the question which arises in the one now before us, and therefore it can afford but little authority to guide our present determination.

It seems to me somewhat difficult to reconcile the decision in the case of *Suydam & Wyckoff v. Keys*, with the doctrine I am endeavoring to establish, or with the principles of some other cases which have been decided here. The defendant was a collector of a tax which had been voted by a school district in Orange county, and assessed by the trustees. They had authority to assess, but were confined in their assessments to the *resident inhabitants* of the district. The plaintiffs having property in the district, but actually resident in New York, were included among the persons assessed, and designated on the warrant issued to the defendant as *inhabitants of the district*. He took their property by virtue of this warrant, and was held liable in an action of trespass. It appears to me the defendant, acting merely as a ministerial officer, should have been allowed the protection of his warrant, which did not show upon the face of it an excess or want of jurisdiction in the trustees. I cannot distinguish this case from a whole class of cases, beginning with the earliest reports and coming down to this, holding that such a warrant is a protection to the officer executing it, unless it is to be distinguished from cases otherwise similar, by the fact that the want of jurisdiction in the trustees to make the assessment on the plaintiffs was to be presumed to be within the knowledge of the officer, and that he was bound to act on this knowledge, in opposition to the statements of his warrant. The decision, however, is not put on such ground, but upon the broad principle that the officer must see that he acts within the scope of the legal powers of those who commanded him. This principle requires a

ministerial officer to look beyond his precept, and examine into extrinsic facts beyond the fact of jurisdiction of the subject-matter generally, or under certain circumstances. Such, I apprehend, was not the doctrine applied to the case of *Warner v. Shed*, 10 Johns. R. 138. There the officer was justified by his process, as that showed the justice's jurisdiction of the subject-matter. "He was not bound," the court say, "to examine into the validity of the proceedings and of the process." The collector's warrant in the former case, as well as the constable's *mittimus* in the latter, showed jurisdiction of the subject-matter in the officers issuing the process. In the former case, it appeared upon the face of the process that the plaintiffs were resident inhabitants, and as such they were liable to be assessed; and I should think that the collector was no more bound to examine into the fact of residence which had been passed on by the trustees, than the constable was to look into the proceedings of the special sessions under whose authority he acted.

I find still greater difficulty in reconciling the case of *Suydam & Wyckoff v. Keys* with that of *Beach v. Furman*, 9 Johns. R. 229. The court assume, though they do not directly decide, that Sarah Furman was not, by reason of being a female, liable to be assessed to work on the highways, yet they held that the justice who issued, at the instance of the overseer of the highways, the warrant on which her property was taken and sold for this illegal assessment, and the constable who executed it, both protected, because they acted ministerially and in obedience to the commissioners and overseer of highways, who had jurisdiction over the subject-matter, the assessment of highway labor. Let us compare this case with that of *Suydam & Wyckoff v. Keys*, and see if they can stand together. The commissioners had jurisdiction of the subject-matter, the assessment of labor. The trustees had jurisdiction of the subject-matter, the assessment of a district tax. The commissioners assessed a person who, by reason of her sex, was not liable to be assessed, as the court in giving their opinion conceded. The trustees assess persons who, by reason of their residence out of the district, were not liable to be assessed; the justice and constable who enforce the commissioners' assessment by taking the property of the person illegally assessed are protected; the constable who enforces the illegal assessment of the trustees, by taking the property of the persons illegally assessed, is held liable as a trespasser. I think these cases cannot well stand together, and if one must be given up, I do not hesitate to say it should be *Suydam & Wyckoff v. Keys*.

The remark of this court in the case of *Gold v. Bissell*, 1 Wendell, 213, "that where a warrant cannot legally issue without oath, but is so issued, all the parties concerned in the arrest under such process are trespassers," was not intended, I presume, to apply to an officer who had no knowledge, from the warrant or otherwise, that it had not been

duly sued out. A remark somewhat similar is made by TRIMBLE, J., in *Elliott v. Piersall*, 1 Peters' U. S. Rep. 340; but the decision of that case did not call for any such distinction as is raised in the one now under consideration. I have felt that the case of *Wise v. Withers*, 3 Cranch, 331, is a direct authority against giving to the officer the protection that is now claimed for him. The plaintiff in that case was a magistrate in the District of Columbia, and, as such, not subject to do military duty. He was fined for neglect of such duty, and a warrant for the collection of the fine issued to the defendant, who seized his property thereon; for this act he was prosecuted. The only point much considered in that case was that which involved the question as to the plaintiff's exemption from military duty; but that which related to the defendant's protection under his warrant was only glanced at in the argument of the counsel and in the decision by the court. The distinction contended for in this case was scarcely raised there, and the attention of the court does not appear to have been drawn to a single case in which it has ever been noticed. The chief justice, in the opinion of the court, merely observes, that it is a principle that a decision of such a tribunal (a tribunal of limited jurisdiction), clearly *without* its jurisdiction, cannot protect the officer who executes it. I would, with deference, ask whether there is not an error in the application of the principle which the chief justice lays down to the case then before the court? He must mean, by a decision being clearly *without the jurisdiction of the court* a sentence or judgment on a matter not within its cognizance. Was the subject-matter of that cause beyond the cognizance of a court-martial? It appears to me that it was not. The power and duty of the court was to punish and fine delinquents; consequently, it had jurisdiction over the subject-matter, but not over the person. There was nothing in the process which the ministerial officer executed to apprise him that the court had not jurisdiction of the *person*. It seems to me that it was not a case to which the principle laid down by the court was applicable; but it would have been such a case if there had been a want of jurisdiction over the subject-matter. I can scarcely consider, therefore, the determination of the Supreme Court of the United States in the case of *Wise v. Withers* a deliberate decision on the question now before us. If it was to be viewed in that light, we should be called upon, by the great learning and high character of that court, to hesitate long and examine carefully before we decided a point conflicting with such decision.

There is certainly high authority for the distinction which I am disposed to recognize in this case; and, in my judgment, the same principle which gives protection to a ministerial officer who executes the process of a court of *general jurisdiction* should protect him when he executes the process of a court of *limited jurisdiction*, if the *subject-matter* of the

suit is within that jurisdiction, and nothing appears on the face of the process to show that the *person* was not also within it.

The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority:

That where an inferior court has not jurisdiction of the subject-matter, or having it has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court, nor the plaintiff (if he procured or assented to the proceedings), can derive any protection from them when prosecuted by a party aggrieved thereby.

If a mere ministerial officer executed any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter or of the person against whom it is directed, such process will afford him no protection for acts done under it.

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the *person* or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process. Bull. N. P. 83; Willes, 32, and the cases there cited by Lord Ch. J. WILLES.

I am therefore of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution, not showing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him in virtue of that process.

Judgment on demurrer for the defendant, with leave to the plaintiff to amend his replication on payment of costs.

CHASE V. INGALLS.

(97 Massachusetts, 524.—1867.)

FOR alleged illegal arrest of plaintiff by defendant as a deputy-sheriff.

WELLS, J. The execution, upon which the plaintiff was arrested and committed, was regular in form, and bore the affidavit and certificate of a magistrate as provided by the Gen. Sts. c. 124, § 5. *Primâ facie*, it is a complete defence to the officers acting in accordance with its directions. The defect relied on by the plaintiff to deprive them of its protection is the fact, now admitted, that the magistrate who made the certificate was the attorney of record of the party in whose favor the execution issued.

It is settled law that an officer is protected by his precept, if the court or magistrate had authority such as the precept assumes. It is not his

duty to inquire into the particular facts of the case, if the general power appear and the process be regular. He cannot be affected by any irregularity occurring prior to the issue of his precept, nor by the existence of any fact which deprives the court or magistrate of jurisdiction in that particular case, provided the defect be not disclosed by the precept itself, nor known to the officer. Even if the defect be one which renders the precept void in its operation between the parties, or for the transfer of property, yet it will not subject the officer to liability as a trespasser. See *Sandford v. Nichols*, 13 Mass. 286, and cases cited to this point by the defendants.

The cases relied upon by the plaintiff do not support any doctrine inconsistent with this. The decision in *Pierce v. Atwood*, 13 Mass. 324, 344, is put expressly upon the ground that the want of authority in the magistrate appeared from the warrant itself. In *Fisher v. McGirr*, 1 Gray, 45, the want of jurisdiction arose from the very character of the proceeding, which the warrant disclosed. In *Piper v. Pearson*, 2 Gray, 120, the officer was held liable because his warrant did not show affirmatively an apparent jurisdiction, there being none in fact, and the burden being upon him to establish his justification.

Where the proceeding is, in its nature, one in which the magistrate has no right to exercise the authority under which the officer assumes to act, he is held responsible, although acting in good faith; because in such case the want of authority is disclosed upon the face of the precept. But where the want of authority arises from some fact that is personal to the magistrate, or peculiar to the proceedings in the particular case, the precept cannot disclose it, and the officer is not to be held liable without actual knowledge of the fact.

The plaintiff offered no evidence to show that the defendant had *actual knowledge* that the certifying magistrate was disqualified; not deeming it to be material whether he knew it or not; and the testimony of the defendant, as reported, would not warrant the jury in finding such knowledge. He is not entitled now to have a jury to determine that question.

* * * * *

Exceptions overruled.

PEOPLE V. WARREN.

(5 Hill, 440.—1843.)

CERTIORARI to the Oneida general sessions, where the defendant was convicted of an assault and battery upon one Johnson, a constable. Johnson arrested the defendant on a warrant issued by the inspectors of election of the city of Utica for interrupting the proceedings at the

election by disorderly conduct in the presence of the inspectors. (1 R. S. 137, § 37.) The warrant was regular and sufficient upon its face. The defendant resisted the officer, and for that assault he was indicted. The defendant offered to prove that he had not been in the presence or hearing of the inspectors at any time during the election, and *that Johnson knew it*. The court excluded the evidence, and the defendant was convicted. He now moved for a new trial on a bill of exceptions.

PER CURIAM. Although the inspectors had no jurisdiction of the subject-matter, yet as the warrant was regular upon its face, it was a sufficient authority for Johnson to make the arrest, and the defendant had no right to resist the officer. *The knowledge of the officer that the inspectors had no jurisdiction is not important.* He must be governed and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. There are some *dicta* the other way; but we have held on several occasions that the officer is protected by process regular and legal upon its face, whatever he may have heard going to impeach it. (*Webber v. Gay*, 24 Wend. 485; *Watson v. Watson*, 9 Conn. 140.)

And without hearing *T. Jenkins* (district attorney), who was to have argued for the people,

New trial denied.

SAME: STRANGER OR THIRD PERSON.

EMERY V. HAPGOOD.

(7 Gray, 55.—1856.)

ACTION for an assault and false imprisonment. Trial before BIGELOW, J., who made the following report:

“The plaintiff put in evidence a warrant issued by Timothy Pearson, Esq., a justice of the peace for this county, directing the commitment of the plaintiff to jail for a contempt committed while said Pearson was acting as a magistrate in trying certain complaints against said plaintiff, for violating, in Lowell, the laws respecting the sale of intoxicating liquors. The plaintiff also put in two complaints made by said Ephraim Hapgood, before said Pearson, against the plaintiff, for an alleged violation, in Lowell, of the law respecting the sale of intoxicating liquors, both dated March 31, 1853, with the warrants issued thereon, and a record of judgments of guilty rendered thereon by said Pearson.

“The evidence tended to show that after said Emery had been tried and convicted on one of said complaints by said Pearson, and when

said Pearson was about proceeding to try said Emery on the other complaint, the alleged contempt was committed by the plaintiff; that said Hapgood, the present defendant, was the complainant in both said cases, and was present at all the proceedings before said Pearson; that, after said warrant for commitment for contempt was issued and delivered to the officer, he hesitated about serving it, and was told by Hapgood to serve it—that if he did not, he, the officer, would be prosecuted—that if he would serve it, he, said defendant, would indemnify and save the officer harmless against all damage on account thereof, and that, in consequence of these statements and promises by the defendant, the officer was induced to commit the plaintiff to jail on said warrant for contempt, which otherwise he would not have done.

“Upon these facts, the plaintiff contended that said Pearson was acting without any authority as a magistrate in all the foregoing proceedings; that said warrant for contempt was bad on its face; and that the defendant was liable as a trespasser.

“The defendant contended, first, that it did not appear by said complaints and warrants against said Emery, for the unlawful sale of liquor, that said Pearson was acting without authority; secondly, that if he was, the warrant for contempt was good on its face, and did not show any want of authority on the part of said Pearson; and that therefore neither the officer, nor the defendant Hapgood, could be held liable as trespassers for serving said warrant.

“But the court overruled these objections, and instructed the jury that said Pearson had no legal authority to issue said warrants; that, in issuing them, he had exceeded his jurisdiction; and the defendant, if he instigated and induced the officer to commit the plaintiff thereon when otherwise he would not have committed him, was liable in this action.

“The court also ruled that the defendant would be liable, though the warrant for contempt was sufficient on its face, if he so instigated and induced the officer to commit the plaintiff thereon, knowing that said Pearson had no authority or jurisdiction to hear and try said Emery on said complaints for illegal sale of liquor.

“The jury returned a verdict for the plaintiff. If the foregoing rulings were wrong, the verdict is to be set aside; otherwise, judgment is to be entered on the verdict.”

BIGELOW, J. The want of jurisdiction in the magistrate to try and determine the complaint originally made by the defendant against the plaintiff, and the invalidity of the commitment of the plaintiff for contempt, are fully settled in *Piper v. Pearson*, 2 Gray, 120. In that case the proceedings before the magistrate were similar to those in the case at bar.

The only question therefore arising in this case is, whether, upon the facts proved, the defendant is liable as a trespasser. In deciding this question, it is unnecessary to determine upon the regularity of the form of the warrant of commitment. This is not an action against an officer for serving the warrant, or against a person acting by or under his authority or sanction. If it were, it would be essential to consider whether the warrant was bad on its face, and disclosed the want of jurisdiction in the magistrate who issued it. For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers, and those acting under them, in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject-matter, he is to obey its command. In such case, he may justify under it, although in fact it may have been issued without authority, and therefore be wholly void.

But such is not the rule applicable to strangers or third persons, who are not required, in the exercise of a public duty, to assume the responsibility of executing legal process. If they interfere of their own motion, without authority or command from the officers of the law, to cause a writ or warrant to be enforced, they act at their peril; and if the process, though regular on its face and apparently good, was unauthorized, or was issued by a tribunal having no jurisdiction, or acting beyond the scope of its power, they are liable for the consequences arising from the enforcement of unlawful process. It is upon this ground, that a party is held responsible, at whose suit execution is made, when the officer serving it incurs no liability. The rule is, that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain a justification. *Barker v. Braham*, 3 Wils. 376; *Parsons v. Loyd*, 3 Wils. 341; *Bryant v. Clutton*, 1 M. & W. 408; *West v. Smallwood*, 3 M. & W. 418; *Codrington v. Lloyd*, 8 Ad. & El. 449; *Carratt v. Morley*, 1 Ad. & El. N. R. 18; *Green v. Elgee*, 5 Ad. & El. N. R. 114.

In the present case, the defendant was a volunteer in urging the officer to serve a void warrant upon the plaintiff; and, under the instructions given to the jury, it is found by their verdict that the plaintiff would not have been committed to jail but for his interference and instigation. He was, in a legal sense, a stranger to the warrant. It was not his duty, or within his province, to cause it to be enforced. After having made and signed the original complaint, and testified in its sup-

port before the magistrate, his duty and responsibility were at an end. *Barker v. Stetson*, 7 Gray, 53. He cannot therefore shelter himself under the authority of the officer, and claim immunity on the ground that the warrant was regular, and disclosed no want of jurisdiction in the magistrate. But it being apparent by the record that the warrant was illegally issued and void, the defendant is responsible for the trespass which he caused to be committed upon the plaintiff.

Judgment on the verdict.

VOID, IRREGULAR AND ERRONEOUS PROCESSES.

FISCHER V. LANGBEIN.

(103 New York, 84.—1886.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the defendants entered upon an order dismissing the complaint, in an action for false imprisonment, brought against the defendants who had acted as attorneys for defendants in the following proceedings:

The plaintiff, a member of an unincorporated association, commenced proceedings for dissolution, and applied for an injunction restraining the disposition of the funds of the association. Some forty-two members of the association, through the defendants as attorneys, opposed the motion. The plaintiff, by his attorney, charged that the opposing members, being Germans and unfamiliar with our language, were misled into swearing to affidavits submitted upon the motion. The matter was then referred to determine the truth of the charge, a provision being inserted in the order, by consent, that the plaintiff should pay the fees of the referee if his charge were found to be false. The referee so found, and the plaintiff failing to take up the report, the defendants obtained an order directing the plaintiff to pay the fees of the referee within three days, or show cause why he should not be committed for contempt, the injunction vacated, and all proceedings stayed until the fees were paid. Upon the return of the order, the court directed a commitment to issue, which was done. The General Term reversed the order of commitment, on condition "that the plaintiff shall stipulate not to bring any action on account of his imprisonment." The plaintiff failing so to do, the order was affirmed, and on appeal to the Court of Appeals was reversed. *Fischer v. Raab*, 81 N. Y. 235.

RUGER, Ch. J. It cannot be disputed but that an attorney who causes

void or irregular process to be issued in an action, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned. In the case of void process the liability attaches when the wrong is committed and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it, of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court, before an action can be maintained for damages occasioned by its enforcement. *Day v. Bach*, 87 N. Y. 56. In such cases the process is considered the act of the party and not that of the court, and he is, therefore, made liable for the consequences of his act.

Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not in some material respect comply in form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or non-existence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding, its order made or judgment rendered therein, is valid and enforceable and affords protection to all persons acting under it, although it may be afterward set aside or reversed as erroneous. *Simpson v. Hornbeck*, 3 Lans. 53. Errors committed by a court upon the hearing of an action or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders or authorize a party to treat them as void, but can be taken advantage of only by appeal or motion in the original action. *Day v. Bach*, *supra*.

There is no claim made that the order and commitment under which the imprisonment complained of in this case was effected, was void or even irregular, except for the alleged erroneous determination made by the Special Term upon the merits of the application. This determination consisted in holding that a contempt had been committed by the plaintiff, while upon appeal this court held otherwise. All of the facts constituting the alleged contempt were undisputed and were presented to the Special Term for its consideration upon the hearing. After hearing the parties it decided that a contempt had been committed and ordered the imprisonment complained of. It was conceded on that hearing that the plaintiff had disobeyed an order of the court, and the only question presented for its consideration was whether such disobedience "defeated, impaired, impeded or prejudiced" a right or remedy of the defendants. Upon

the appeal to this court it was held that the case did not clearly show that any right or remedy of the defendants had been defeated, impaired, impeded or prejudiced by the disobedience alleged, and the order adjudging the plaintiff guilty of a contempt was, for that reason, reversed as erroneous. *Fischer v. Raab*, 81 N. Y. 235. A simple question of law was thus presented to the court as to whether all of the elements constituting the offense of contempt appeared on the application for the commitment. Whether they did or did not in no sense constituted a jurisdictional question. The court concededly had jurisdiction of the parties and the subject-matter of the application, and we think authority to determine whether a contempt had been committed or not; and the question for its consideration was whether the facts of the case brought it within the statutory definition of a contempt. An erroneous decision of that question in no sense affected the jurisdiction of the court over the subject-matter of the application. In a similar case it was said by this court that the fact that a justice of the peace "had jurisdiction of the person of the plaintiff and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt, and to imprison her therefor. To have that authority there must have arisen before him, facts which gave him power to consider of the question whether there had been a contempt committed by her. When facts arose which gave him that power he had a right to adjudicate upon them, and is not liable to an action though he may have held erroneously as matter of law." *Rutherford v. Holmes*, 66 N. Y. 368, 370.

In the present case the court made an order, upon the application of the plaintiff, referring a certain disputed question of fact to a referee to hear and determine, and in case such report was against the plaintiff, that he should pay the referee's fees incurred thereon. The plaintiff cannot question the validity of this order, for it was made at his request and upon his stipulation to pay the fees in the event provided for. The order was, therefore, lawful and such as the court had a right to make under the circumstances. The report of the referee being against the plaintiff, he was required to pay the fees and take it up; but this he neglected and refused to do. For this refusal he was adjudged guilty of contempt.

The disobedience of its order by the plaintiff gave the court jurisdiction of the subject-matter and called upon it to determine whether a contempt had been committed or not. The right to adjudicate upon this question did not depend upon the fact whether the plaintiff was guilty of a contempt, but whether a case had been made calling for an adjudication upon that question.

The power of the court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a sustainable cause of action, but upon the performance by the party of the prerequisites

authorizing it to determine whether one exists or not. In *Harman v. Brotherson*, 1 Den. 537, the defendant, a judicial officer, had awarded a *capias* upon affidavits which did not disclose such a cause of action as subjected the defendant to arrest therefor. He was, however, arrested and imprisoned, and in an action against the judge for false imprisonment it was held that he was exempted from liability by reason of the judicial character of his determination. In *Landt v. Hilts*, 19 Barb. 283, a county judge was prosecuted for false imprisonment for granting an order of arrest, which was afterward vacated upon the ground that the affidavit upon which it was founded did not show a sufficient cause for arresting the party. It was held, however, that the "decision and the order protected the party applying for it and the attorney and all persons acting in obedience to the order;" that the affidavit presented "a state of facts which called upon the officer to pass judicially upon the question and to determine whether a case for an order was made out or not." "It presents, to say the least, a colorable case, and that is enough to protect the officer who issued it." It was further said, "that the doctrine, that the judicial officer is protected whenever he has jurisdiction and enough is shown to call upon him for a decision, even though he err grossly and even intentionally, has long been firmly established. Upon the same principle of public policy parties who in good faith institute the proceedings and act under and in accordance with judicial determination should be protected from accountability as trespassers whenever the officer is entitled to protection." This case is largely and approvingly quoted from in *Marks v. Townsend*, 97 N. Y. 590, 599. In *Miller v. Adams*, 7 Lans. 133, affirmed in this court (52 N. Y. 409), the defendant was prosecuted for false imprisonment in procuring an attachment for contempt against a third party for not appearing before the judge in supplemental proceedings in obedience to an order requiring him to do so.

The affidavit upon which the attachment was issued was held upon appeal to be defective and not to show the existence of the contempt alleged. It was held, however, that it constituted a protection as well to the officer issuing it as to the party procuring it; that the officer issuing the attachment had "jurisdiction of the matter and acted judicially in making the order, and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment."

It seems to us that the case of *Williams v. Smith*, 108 Eng. C. L. 596, is indistinguishable in principle from this. As concisely stated by Justice ERLE it was as follows: "The master of the rolls decided on the facts that Williams was guilty of contempt in not obeying the order. Such is the judgment of the master of the rolls on the very facts between the parties. The legal inference which that learned judge drew from the facts which were presented to him on the part of Williams was

that he was guilty of a contempt. Upon appeal the lords justices were of opinion that the master of the rolls came to an erroneous conclusion, and they reversed his decision. That is a totally different thing from setting aside the attachment for irregularity in the proceedings." It was held that the decision of the master of the rolls was a judicial determination that protected the parties acting under it as well as the officers making it.

The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law or determine as to inferences to be drawn from circumstances, reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereof does not render an order or process based upon it, although afterward vacated or set aside as erroneous, void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises, and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason upon evidence which might in its consideration affect different minds differently, a judicial question is presented which, however decided, does not render either party or the court making it, liable for the consequences of its action.

It is further claimed that the defendants made themselves liable in this action by refusing to consent to the discharge of the plaintiff by the sheriff after he had complied, as it is alleged, with the terms of the commitment, and for opposing before the Special Term proceedings taken for his discharge.

These proceedings all took place before it was finally determined that the plaintiff was not guilty of a contempt in refusing to obey the order referred to, and so far as anything appearing in this record shows, when the defendants naturally believed that the plaintiff was rightfully imprisoned thereunder. The relief claimed was denied by the courts before whom they were taken, and it must here be assumed that it was rightfully denied for the reason that the plaintiff had not complied with the terms of the order entitling him to a discharge.

If the defendants were not liable for damages for the original imprisonment, it is quite certain that they were not responsible for the action of the sheriff or the court in continuing it. No obligation rested upon the defendants to consent to, or procure the discharge of the plaintiff, as the right to such relief depended solely upon his compliance with the terms of the order committing him.

Some claim is made that the commitment was void for not containing the statement that the disobedience referred to as the contempt had defeated, impaired, impeded or prejudiced some right or remedy of the defendants in the action. Not only the order and affidavit upon which it was founded, but the commitment itself, stated in detail the proceedings which it was claimed the disobedience in question affected, and presented all of the facts upon which the judgment of the court in awarding the commitment was based, and fully complied with the requirements of the rule in respect to the contents of a commitment.

The judgment of the court below should be affirmed, with costs.
All concur.

Judgment affirmed.

EVERETT V. HENDERSON.

(146 Massachusetts, 89.—1888.)

CONTRACT on a poor debtor's recognizance, entered into by the first-named defendant as principal, and by the other defendant as surety, and containing the usual conditions.

At the trial in the Superior Court, before MASON, J., it appeared that the plaintiff duly recovered judgment against Henderson in the Municipal Court of the City of Boston, on May 29, 1884, and that execution duly issued on the judgment, but was returned in no part satisfied, and without service. On September 3, 1884, an *alias* execution on the judgment duly issued, and on September 8, 1884, the plaintiff made an affidavit, in due form of law, before Edward J. Jones, a master in chancery, that he believed, and had good reasons to believe, that Henderson "has property not exempt from being taken on execution, which he does not intend to apply to the payment" of the claim; and that Henderson "contracted the debt with an intention not to pay the same." Thereupon Jones, upon an *ex parte* hearing, granted a certificate "that, after due hearing, I am satisfied there is reasonable cause to believe that the charge made in the said affidavit is true; and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor on the annexed execution;" and annexed the affidavit and certificate to the *alias* execution.

On November 1, 1884, Henderson was arrested in Boston, by an officer duly qualified to make the arrest and serve the execution, and carried before Edward J. Jenkins, a commissioner of insolvency, before whom he gave the recognizance.

On November 24, 1884, Henderson duly gave notice of his intention

to take the oath for the relief of poor debtors, before Henry W. Bragg, a master in chancery, and several hearings were had. On March 7, 1885, pending the examination, the plaintiff duly filed before Bragg charges of fraud, among which was the one sworn to in the affidavit, and hearings were had on such charges. The hearings on the charges of fraud were continued from time to time, and finally to April 18, 1885, at one P. M., at which time the plaintiff and Henderson appeared and remained during the whole hour, and after the lapse of the hour the plaintiff, before the appearance of the magistrate, departed. The magistrate, Bragg, was not in attendance within the hour, and did not appear and attend until a quarter past two o'clock, nor did any other magistrate attend in his place, and there were no further adjournments or proceedings had.

The defendants contended that the affidavit was made by the plaintiff falsely, fraudulently, and without probable cause, and that the plaintiff did not, at the time he made it, believe or have good reason to believe the affidavit to be true. The plaintiff, before any evidence was offered by the defendants, asked the judge to rule that no evidence could be offered or introduced in this action to control or affect the affidavit, or to show that the affidavit was false, fraudulent, or made without probable cause, or that the plaintiff did not believe, or had no good reason to believe, that the affidavit was true; but the judge refused so to rule, and admitted evidence to show that the affidavit was false and fraudulent, and made without probable cause, and that the plaintiff did not believe, and had no good reason to believe, the affidavit to be true at the time of making.

The judge instructed the jury, that the burden of proof was upon the defendants to establish the defence of fraud, and it must be proved affirmatively; that it was not sufficient to show that Henderson intended to pay the debt when he contracted it, nor that the plaintiff when he made the affidavit had no good reason to believe that Henderson did not intend to pay the debt when he contracted it; that, while it was necessary for the defendants to prove both these propositions, they must go further, and prove that the plaintiff did not believe the affidavit when he made it, and that it was in fact a corrupt affidavit; that if the defendants proved all this, and that the magistrate's certificate authorizing the arrest was obtained by the fraud and perjury of the plaintiff, the plaintiff could not avail himself of the arrest thus obtained as the foundation of his cause of action, but as between the plaintiff and these defendants the arrest and recognizance would be void, and their verdict should be for the defendants; but that if the defendants had not sustained the burden of proof, and established wilful fraud and perjury on the part of the plaintiff, their verdict should be for the plaintiff in the penal sum named in the recognizance.

The jury found for the defendants; and the plaintiff alleged exceptions.

KNOWLTON, J. The defendants contend that the recognizance declared on cannot be enforced, because the proceedings in which it was taken were founded upon a wilfully false affidavit of the plaintiff. The act imputed to the plaintiff involves such moral turpitude that we cannot permit him even temporarily to profit by it, unless upon principle as well as authority our duty is clear.

The wrong complained of, so far as it affects the question before us, was like an ordinary malicious prosecution of a groundless suit. The proceedings for the arrest of the defendant Henderson were in the nature of a new prosecution. They were for the purpose of obtaining a remedy which was not available without them. The statute provides that they "shall be considered in the nature of a suit at law." Pub. Sts., c. 162, § 49. They were founded upon allegations of fact, heard at first *ex parte*, which, if issue was taken upon the arrest, were afterward to be regularly tried between the parties, with a view to an adjudication which should give or withhold the remedy sought. It is admitted that the affidavit was proper in form and substance, that the magistrate had jurisdiction to act upon it, and that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest. The arrest was regularly made by a proper officer, and the defendant Henderson was taken before a magistrate, and there entered into the recognizance in suit. The proceedings being conceded to have been in all other respects legal and proper, it is contended that the known falsity of the plaintiff's allegations in his affidavit rendered the arrest, as to him, illegal, and the recognizance void.

It is familiar law that an officer called upon to serve a process needs only to see that it is good upon its face, and it is not suggested that the conduct of the officer or of the magistrate in relation to this arrest can be called in question. But there are cases in which an officer is protected in making an arrest, when the person who caused it or set the proceedings in motion is liable. If the arrest in this case was legal as to the plaintiff as well as the officer, the recognizance founded upon it was legal also, and can be enforced in this action. If it was illegal as to the plaintiff, he can be sued in trespass for causing it, the process as to him is no justification, and the recognizance is tainted with illegality and is void. We are brought, therefore, to the inquiry, Under what circumstances is an arrest under process illegal, as to the party causing it to be made?

There is no doubt that one who obtains a process and causes it to be served assumes the duty of seeing that it is well founded. He should know that it rests upon a good record, or other proper preliminary proceeding; but so far as the matter depends upon an adjudication by a

court or magistrate having jurisdiction, he may rely upon that. Processes good on their face may be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them. Processes voidable for error do not subject the person who directs their use to any liability, even after they are set aside. But processes irregularly obtained may be set aside, and then, as against those who obtained them, acts done under them are deemed to have been done illegally. *Cassier v. Fales*, 139 Mass. 461; *McGregor v. Crane*, 98 Mass. 530; *Barker v. Braham*, 3 Wils. 368; *Tarlton v. Fisher*, 2 Doug. 672; *Belt v. Broadbent*, 3 T. R. 183; *Bates v. Pilling*, 6 B. & C. 38; *West v. Smallwood*, 3 M. & W. 418; *Collett v. Foster*, 2 H. & N. 356, 361; *Chapman v. Dyett*, 11 Wend. 31; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.), 242; *Lovier v. Gilpin*, 6 Dana, 321.

In cases of error, the judicial action in which the error is found is a justification for all who have acted in reliance upon it. In *Marks v. Townsend*, 97 N. Y. 590, where a process for arrest was set aside for error, it was held that the person who obtained it was not liable, and it was said in the opinion, that if he had known facts which made the arrest improper, and, concealing them, had maliciously made the affidavit and caused the arrest, he would not have been liable for false imprisonment, but only for malicious prosecution. The affidavit seems to have been of matters other than those to be tried in the proceeding then instituted, and against this *dictum* there are conflicting *dicta* in other cases. Some judges have intimated that action like that supposed would constitute irregularity, for which the process might be set aside even if there was error also, and that the affiant would then be liable in trespass for false imprisonment. *Williams v. Smith*, 14 C. B. (N. S.) 596; *Smith v. Sydney*, L. R. 5 Q. B. 203; *Daniels v. Fielding*, 16 M. & W. 200.

The cases of irregularity cover a variety of defects in the record, or in other preliminary proceedings. Irregularities do not result from wrong adjudications, and in that respect they differ from errors. But irregularities, whether we include in the term those fundamental defects which go to the jurisdiction and render the process void, or limit it by a stricter definition which will comprise only those upon which the proceedings may be set aside, do not include false allegations of fact, made as a foundation for a suit in which the allegations are to be proved or disproved. And this is equally true whether they are falsely made by mistake or by design.

The remedy for causing an arrest by maliciously bringing a suit upon false charges, or maliciously making a false affidavit, is by an action on the case for a malicious prosecution. *Legallee v. Blaisdell*, 134 Mass. 473; *Luce v. Dexter*, 135 Mass. 23; *Baron v. Sleight*, 2 Cro. Eliz. 628;

Daniels v. Fielding, 16 M. & W. 200, 207; *De Medina v. Grove*, 10 Q. B. 152, 170; *Sheldon v. Carpenter*, 4 N. Y. 578. These authorities imply the negative, that an action of trespass for the arrest or for false imprisonment will not lie. And this point has been directly adjudicated. *Coupal v. Ward*, 106 Mass. 289; *Mullen v. Brown*, 138 Mass. 114; *Langford v. Boston & Albany Railroad*, 144 Mass. 431; *Wood v. Graves*, 144 Mass. 365; *Daniels v. Fielding*, 16 M. & W. 200; *Barber v. Rollinson*, 1 C. & M. 330. In each of the first three of the latter cases the arrest was upon a criminal prosecution, and the complainant did not cause it in the same sense as one causes an arrest who sues out a *capias* for his own purposes, and gives it to an officer with directions to serve it. One who makes a criminal complaint does not commonly direct the service of the precept, but from the beginning the control of the prosecution is with the officers of the law. In *Wood v. Graves*, *ubi supra*, in which the arrest was under a criminal warrant, it was held that the defendants were not liable for false imprisonment on account of abusing the process by procuring it to be issued for an improper purpose, and that the only abuse which would render them liable was an improper use of it after it had been served. In *Cassier v. Fales*, 139 Mass. 461, it is said that "it is difficult to see how any person can be guilty of a trespass in serving or causing to be served a valid writ, or other process of a court." *Lovier v. Gilpin*, 6 Dana, 321, 328, was an action of trespass against the plaintiff in a civil suit, for causing an attachment of property and assisting the officer in making it. There was an offer to show that the process was maliciously obtained, and in an elaborate opinion, reviewing the cases and holding that the action could not be maintained, MARSHALL, J., said: "We have found no case in which a party who institutes a groundless proceeding has been held liable as a trespasser for what is done by his direction, or with his aid, in the regular course of that proceeding, unless the process under which the act complained of was done be void, or unless, if voidable only, the process itself, or the proceeding on which it rests, has been set aside or annulled before the action of trespass is brought."

The doctrine that the validity of proceedings in a suit at law cannot be called in question on the ground that it is not well founded in fact, rests upon important considerations of public policy. Every suit involves allegations of fact upon which a claim is founded. If the claim is resisted, the truth or falsity of the allegations is to be ascertained by a trial in the suit itself. The bringing of the suit is an offer on the part of the plaintiff to prove them. All action in the case proceeds upon the theory that the plaintiff is ready to maintain his claim, and that he may or may not succeed in establishing it. Every step in the suit is incidental to the purpose for which it is presumed to have been brought,—that of determining whether its allegations are true, and of obtaining

a remedy if they are proved. Provisions are made for preserving the rights of both parties. They all recognize that the existence of a just cause of action is in dispute, and is to be regularly inquired into and finally passed upon in the suit itself. Whatever the law prescribes in the course of the proceeding, whether for the security of the plaintiff by way of attachment or arrest, or for the protection of any other interests of either party, may be legally done, and an ultimate decision that the plaintiff was mistaken or willfully false in the original statement of his cause of action should not render it invalid. And this because there must be incidental acts, oftentimes of great importance and variety, in the litigation of a disputed question; and it is necessary that rights dependent upon these acts should be fixed and stable. Neither the plaintiff, nor any one else connected with the suit, should be called upon by the defendant to try collaterally the questions involved in it.

If, while the suit is pending, it should be attempted to separate the question of the merits of the action from that of the plaintiff's belief in regard to the merits of it, it would be practically impossible to do it. The rule is familiar, that an action for malicious prosecution cannot be maintained until the original suit has first been determined in favor of the original defendant. So long as anything remains open for trial upon the plaintiff's allegations in that, it will be deemed to have been properly brought. When it has been decided in favor of the defendant, he may show, if he can, that it was brought maliciously and without probable cause, and recover damages for the wrong done him.

There is no want of jurisdiction, irregularity, or error to affect any of the proceedings in a suit brought in due form, on a maliciously false statement of a claim. The only questionable element in it relates to that which must be uncertain in every case, the validity of the plaintiff's claim, and his belief in regard to it. When the uncertainty as to which of the parties is right is eliminated at the trial by a verdict for the defendant, or the case is otherwise ended in his favor, and an action for malicious prosecution is brought, the former proceedings cannot be set aside, and are not rendered invalid.

In an action for malicious prosecutions damages may be recovered for all the injury which resulted directly from bringing the suit, and from the measures regularly adopted in conducting it. It would be an anomaly if one could recover in such an action, and recover also in trespass from the same defendant for an arrest regularly made as a part of the same prosecution; or if an attachment of property, or any other incidental act from which damage resulted, could be made a separate cause of action, on the ground that it was illegal as against the original plaintiff who caused it;—much more if, before the termination of the original suit, one who as receptor had contracted with an officer to return attached property on demand could answer the officer's suit

for the goods by alleging that the attachment was illegal as against the original plaintiff because the suit was maliciously brought; or if the officer himself could make a similar answer to a suit by the plaintiff for negligence in the performance of his duty in relation to an attachment.

If in the case at bar the arrest was not illegal as against the plaintiff, there was no defect in the recognizance. It was for a good consideration, and was entered into in due form, in accordance with the statute, before a magistrate having jurisdiction. Moreover, under our law it became the only security of the plaintiff, and stood in place of the judgment and execution. *Brown v. Kendall*, 8 Allen, 209, 210; *Morgan v. Curley*, 142 Mass. 107. It was perfect unless tainted with illegality. But the same considerations that show the arrest to have been regular and legal apply to this also. Indeed, this having been entered into voluntarily by the defendants, the only illegality to affect it must be sought for in the arrest which preceded it.

And it cannot be truly said that the reasoning applicable to arrests or attachments upon ordinary suits maliciously brought is inapplicable to this arrest upon execution. For the affidavit was a statement of matters which if true entitled the plaintiff to prosecute and maintain his suit in this way. The charge of fraud was the foundation of the new proceeding. It was a charge upon which the defendant could plead not guilty, and demand a trial, which would determine the ultimate rights of the parties. That trial could be had quickly, and the statute contemplated that both parties should proceed regularly in the mode prescribed, to ascertain the truth or falsity of the facts alleged, as they are required to do in any suit at law. The fact that an issue in relation to the pecuniary condition of the defendant was also triable is immaterial. Every reason why arrests and attachments made in suits upon maliciously false declarations should be held legal, can be urged in support of the legality of the arrest in this case.

This case does not fall within the principle of numerous cases in which it is held that one shall not be permitted to take advantage of his own wrong. It is true that an arrest which is accomplished by means of an unlawful act, like breaking a dwelling-house, is void. But in these cases there is illegal action which precedes or accompanies the use of process, and is outside of it, and which leads directly to the arrest, and enters as an element into it. In the case at bar the arrest was not directly caused by an unlawful act. The plaintiff had no connection with it except through the process which he ordered served according to its precept. He made a statement under oath, which showed a proper case for an arrest, and a trial in the manner prescribed by law. The magistrate in a preliminary hearing acted judicially upon it, and gave his certificate of authority. Making a statement in such a case is in itself

a lawful act; and a process regularly issued upon it, under which the statement may be further passed upon, is a lawful process. Illegality and fraud taint the statement, but not the process. That is good in law, whether the statement be true or false.

So where unlawful acts have been done in obtaining an attachment of property, like taking possession of it on Sunday, or fraudulently inducing the owner to bring it from a State where it cannot be attached to one where it can, there has been an element of wrong other than in the cause of action upon which the writ was procured. *Parsons v. Dickinson*, 11 Pick. 352; *Isley v. Nichols*, 12 Pick. 270; *Deyo v. Jennison*, 10 Allen, 410. In each of the cases cited there was fraud or misconduct in regard to the property before it was taken under the writ, which made it unlawful for the plaintiff to attach it. The writ of replevin referred to in *Pine v. Morrison*, 121 Mass. 296, was not between the parties to that suit, and did not present for trial the issue presented in that. In *Crocker v. Atwood*, 144 Mass. 588, the fraud was not solely in stating a fictitious claim. The attachment of a particular article of personal property does not ordinarily follow from merely suing out a writ of attachment. Besides obtaining the writ, the plaintiff, in the original case to which *Crocker v. Atwood*, relates, "caused the property to be taken on the attachment," and this he did with a fraudulent purpose to deprive the defendant of his rights in it. The case merely holds that other fraud may be taken advantage of, notwithstanding that there was a malicious prosecution.

A distinction has sometimes been suggested between illegality as a ground for a suit, and illegality which can be availed of in defence against the claim of another. But no such distinction exists in cases like that at bar. If the arrest was illegal as against the plaintiff, it was so as well for the purpose of sustaining a suit against him for his wrong as for defeating an action brought upon the recognizance. In *Ammidon v. Smith*, 1 Wheat. 447, it was held that the fraudulent taking of an oath by a person under arrest on a civil process, and the obtaining of a release thereby, did not constitute an escape, nor charge the sureties in a suit upon his bond for the prison limits, even though they participated in the fraud. That too was a case in which the oath taken was not the foundation of proceedings for the purpose of trying the allegations contained therein. See also *Smith v. Quinton*, 2 Bray. (Vt.) 200.

If the validity of legal proceedings could be tried collaterally before the termination of the suit, on the ground that a false cause of action was maliciously stated, or that a false affidavit for arrest was maliciously made, a defendant whose property had been taken might sue for an injunction against the attaching officer. A defendant arrested, instead of trying the facts charged in the affidavit, in the manner prescribed by law, might apply for release upon *habeas corpus*, or, after a

trial upon the charges before a magistrate, and at any time before final judgment in the Superior Court, if he saw he was likely to be convicted, he might make default, and set up, as the defendants have done in this case, the falsity of the affidavit in defence to the supplemental suit upon the recognizance. With such a rule there could be no regularity in procedure, and no certainty as to the value of any security.

In a case of this kind there is no hardship in leaving a party to existing remedies. He may, first, obtain under the statute an early hearing of the matters alleged against him, and secondly, after the case is ended, he may, if the facts will warrant it, bring his action for a malicious prosecution.

If this remedy is not now available to the defendant, it is because of neglect or misfortune for which he is legally responsible. It was his duty to have a magistrate present to hear or continue the cause at the time to which the hearing was adjourned. His neglect of that duty was a breach of his recognizance. Whether, with such a termination of the proceeding, he can now bring a suit for malicious arrest or prosecution is a question which is not before us. In *Fortman v. Rottier*, 8 Ohio St. 548, it was held by a majority of the court, that an action for malicious prosecution could be maintained for procuring an attachment upon a false affidavit, without first getting the proceeding set aside. And in *Bump v. Betts*, 19 Wend. 421, a similar decision was made, where property was attached and a judgment *in rem* obtained upon a false and malicious affidavit that the defendant had absconded. But in both of these cases it seems that the affidavits were not of matters which were to be tried in the regular course of proceedings instituted by them, and in that respect they differ from that in the case at bar.

Inasmuch as the jury were permitted to find for the defendants upon a defense which was not properly open to them, the entry must be

Exceptions sustained.

JUSTIFICATION: ARREST WITHOUT PROCESS, FELONY.

SAMUEL V. PAYNE.

(1 Douglas, 359.—1780.)

ACTION of trespass and false imprisonment against Payne, a constable, and two others. The facts of the case were these: Hall, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search-warrant was granted by a justice of peace upon this charge, but there was no war-

rant to apprehend him. On the search, the goods were not found; however, Payne, Hall, and the other defendant, an assistant of Payne's, arrested the plaintiff, and carried him to the Poultry Compter on a Saturday, when no alderman was sitting, by which means he was detained till Monday, when, after examination, he was discharged. The cause was tried before Lord Mansfield, and a verdict found against all the three defendants. At the trial, his Lordship and the counsel on both sides looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by anybody. His Lordship therefore left it to the jury to consider whether any felony had been committed. The rule, however, was considered as inconvenient and narrow, because, if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound, first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine and commit or discharge.

On this ground a motion was made for a new trial, and, after cause shown, the court held that the charge was a sufficient justification to the constable and his assistants, and cited *Ward's Case*, in Clayton (Clayt. 44, Pl. 76); 2 Hale's Pleas of the Crown, 84, 89, 91; and 2 Hawkins, B. 2, c. 12, and c. 13.

The rule made absolute.

BECKWITH V. PHILBY.

(6 Barnewall & Cresswell, 635.—1827.)

ACTION for assaulting and imprisoning plaintiff.

LORD TENTERDEN, C. J. I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain

such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Rule refused.

ALLEN V. WRIGHT.

(8 Carrington & Payne, 522.—1838.)

THE declaration stated that the defendant, on the 19th of March, 1838, assaulted the plaintiff, and forced and compelled her to go into the public street, and through several lanes, etc., to the police station-house in Tower street, Lambeth, and there imprisoned and kept her, without any reasonable or probable cause, for twenty hours, contrary to law and against her will; and that on the 20th of March, he again assaulted her, and compelled her to go from the station-house to Union Hall Police Office, and there kept and detained her for six hours, whereby she was not only hurt and injured in her body and mind, but also exposed and injured in her credit and circumstances. The defendant pleaded, first, "Not guilty;" and secondly, a special plea to the following effect:—that the plaintiff was a lodger in the defendant's house, and was supplied with a feather-bed, which, during a portion of the time, was made by the plaintiff and a servant of the defendant; that the plaintiff, while she was such lodger, demeaned herself in an improper, irregular, and disreputable manner, and particularly in receiving the visits of, and cohabiting with one G. D.; and that, after a certain time, she refused to allow the servant to assist in making the bed, and always locked the door of the room when she went out. It then averred that while the plaintiff continued as lodger, as aforesaid, 70 lbs. weight of feathers were stolen from the bed; and that the defendant, having good and probable cause of suspicion, and vehemently suspecting the plaintiff to be the person who stole them, caused her to be apprehended, etc., etc.

From the evidence on the part of the plaintiff, it appeared that she resided for some time in the house of the defendant with a gentleman named Davidson, who passed with her by the name of Gordon. They left in the evening of Friday, the 16th of March, between six and seven o'clock; and, after they were gone that same evening, a friend of the gentleman, paid the defendant for him several claims for damage to furniture, etc., and at that time nothing was said about any loss of feathers from the bed. On the evening of Monday, the 19th of March, about ten o'clock, the defendant and his wife were observed by a policeman on duty, watching the house, No. 12, in the Waterloo Road. The defendant addressed the policeman, and told him he wished to ascertain whether a young woman named Gordon was living there. The policeman inquired what he wanted her for, and was told of the damage sustained which had been paid for, and also that there was a larger quantity of feathers missing out of the bed. The policeman knocked at the door, and gained admittance to the house, together with the defendant. The plaintiff inquired who wanted her, and on being told, said she could not see Mr. Wright that night. It was then about twenty minutes past ten. The policeman and Mr. Wright followed the servant upstairs. They saw the plaintiff, and the policeman asked the defendant if that was the person. He said, yes, it was, and then charged her with stealing the feathers out of the bed in his house while she was lodging there. The policeman told her that she must go with him to the station-house. She at first objected, but afterwards went, and the defendant made his charge to the inspector, and she was locked up in a cell, where she remained till between ten and eleven the next morning. A duplicate for a bed was found upon her. After the plaintiff had been locked up, the policeman went back with the defendant's wife to the plaintiff's lodgings, but nothing belonging to the defendant was found there. The plaintiff was taken on the next day before Mr. Trail, at Union Hall, who discharged her. The defendant wished him to remand her, but he would not.

It was also proved, that the gentleman with whom the plaintiff lived, supplied her with adequate means of support; and a witness stated, that he had examined the bed, and found it to be a very old one, and expressed it as his opinion that the quantity of feathers in it was sufficient for its size.

TINDAL, C. J., after stating the complaint in the declaration and the defendant's answer to it, said:—That is an answer which it is incumbent on him to make out to your satisfaction, because he has taken the law into his own hands by not acting as any prudent person would have done, viz., going before a magistrate and taking out a warrant. At all events, the defendant acted in a very indiscreet manner (as there was no reason

to conclude that the plaintiff had any intention to abscond) in not taking the usual and cautious step of having the case investigated by a magistrate before imprisoning the party. The only two points upon which you must be satisfied before you can find a verdict for the defendant, are, 1st, that a felony had actually been committed; that some person or other had stolen, according to the evidence, about half the feathers from the bed; and 2nd, that the circumstances were such, that you yourselves, or any reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it. If you think the circumstances were such, you will find your verdict for the defendant; if you do not, you will find your verdict for the plaintiff, and give her such reasonable damages as you think she is entitled to.

Verdict for the plaintiff—Damages, 5l.

BURNS V. ERBEN.

(40 N. Y. 463.—1869.)

ACTION for false imprisonment. Defendant Frost, an officer, defaulted. Plaintiff was nonsuited. An appeal from the judgment resulted in an affirmance.

WOODRUFF, J. By section 8 of the act to establish a metropolitan police district, passed April 15, 1857 (chapter 569, Laws 1857), the members of the police force of that district are given, "in every part of the state of New York, all the common law and statutory powers of constables, except for the service of civil process." And in the amendatory act passed April 10, 1860 (chapter 259, Laws 1860), it is declared, in the twenty-eighth section, that the members of the police force of that district "shall possess in every part of the state all the common law and statutory powers of constables, except for the service of civil process."

In pursuance of information given by the defendant Erben, the defendant Frost, accompanied by Erben, arrested the plaintiff without warrant, took her to the police station, where she was detained a few minutes, and after some conversation with the officer in charge she was permitted to return to her residence. For this she has brought the present action for false imprisonment.

A felony had been committed that evening at the house of Mr. Henry Erben, the defendant's father. On that point there is no dispute or conflict. The plaintiff had visited the house that evening, and, according to the information upon which the defendant acted, was the only

person not a member of the family who had been in the basement. Silver had been stolen from the basement. It was there when the plaintiff entered and until after 8 o'clock, and it was missed very shortly after she left the house. Of these facts the proof was distinct and without contradiction.

Upon a report of these facts, Frost, accompanied by the defendant Erben, made the arrest as above stated.

The inquiry is therefore whether, under the statutes above cited and the common-law rule in respect of arrests made or aided by private persons, the plaintiff was entitled to recover. There were no facts in dispute requiring the submission of any question to the jury, unless it be held that there was no justification.

I have no doubt upon the subject. The writers upon criminal law and the reported cases, so far as I have examined them, hold uniform language.

Lord TENTERDEN, C. J., in *Beckwith v. Philby*, 6 Barn. & Cres. 635, says: "The only question of law in this case is whether a constable, having a reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed is authorized to detain the party suspected until inquiry can be made by the proper authorities." See Hawk. P. C. book 2, cc. 12, 13; 1 Russell on Crime, 594, 595; Steph. Cr. L. 242, 243; 1 Chit. Cr. L. 15, 17; *Samuel v. Payne*, Doug. 358; *Lawrence v. Hedger*, 3 Taunt. 14; *Regina v. Toohy*, 2 Ld. Raymond, 130; *Hobbs v. Brandscomb*, 3 Camp. 420; *Davis v. Russell*, 5 Bing. 354; *Cowles v. Dunbar*, 2 Car. & P. 565.

In *Ledwith v. Catchpole*, Cald. Cas. 291, 1 Burns, Justice, pp. 130, 131, Lord MANSFIELD says, in an action against the officer: "The question is whether a felony has been committed or not. And then the fundamental distinction is that if a felony has actually been committed a private person may, as well as a police officer, arrest; if not, the question always turns upon this, was the arrest *bona fide*? Was the act done fairly and in pursuit of an offender, or by design, or malice, or ill will? . . . It would be a terrible thing if, under probable cause, an arrest could not be made; many an innocent man has and may be taken up upon suspicion, but the mischief and inconvenience to the public in this point of view is comparatively nothing; it is of great consequence to the police of the country."

The justification of an arrest by a private person was made in *Allen v.*

Wright, 8 Carr. & Payne, 522, to depend on, first, the fact that a felony had been actually committed; and, second, that the circumstances were such that a reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it.

These principles are affirmed in this state in *Holley v. Mix*, 3 Wend. 350, in very distinct terms: "If a felony has been committed by the person arrested, the arrest may be justified by any person without warrant. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to believe."

The fact being proved in this case that a felony had in fact been committed, I have no hesitation in saying, that however unfortunate it was to the plaintiff, the circumstances fully justified the suspicion which led to her arrest. It is claimed that these circumstances should have been submitted to the jury. Not so; a verdict finding no reasonable ground of suspicion would have been against evidence. There was no conflict of testimony, and that the arrest was made without malice, in good faith, and upon reasonable grounds, is to my mind incontrovertible.

The appeal appears to me to have been taken upon a misapprehension of the construction and effect of the statutes conferring power on the policeman. I think the power perfectly clear, and I notice that the rules and regulations of the board of police are in conformity therewith; and it is made the duty of the officer to take the arrested person immediately before the police court, or, if made at night or when the courts are not open, immediately to the station house, where the officer on duty is required to examine whether there is reasonable ground for the complaint, and, if so, to cause the party to be taken before the court the next morning. Under such a system, innocent parties may sometimes be subjected to inconvenience and mortification; but any more lax rules would be greatly dangerous to the peace of the community, and make the escape of criminals frequent and easy.

The judgment should be affirmed. All the judges concurring.

*Judgment affirmed.*¹

¹ Opinion by JAMES, J., omitted. See Erwin's Summary of Torts, 2d ed., pp. 90-93; N. Y. Law Journal of May 16, 1906; *Hadley v. Perks*, L. R. 1 Q. B. 444, 456 (1866); *Philips v. Leary*, 114 App. Div. 871, in which the law is asserted by GAYNOR, J., without, however, the citation of a single case in support of his assertion, and in utter disregard of usual and customary interpretation of language. As what is said is *obiter*, it is of little, if any, value.

SAME: MISDEMEANOR.**QUINN V. HEISEL.**

(40 Michigan, 576.—1879.)

TRESPASS by Heisel against Quinn for an assault and battery. Quinn claimed to be a policeman of Grand Rapids, and gave evidence to show that the alleged assault consisted in forcibly arresting Heisel, under a city ordinance, for disorderly conduct. There was testimony that Heisel used profane and abusive language to certain laborers, swore that he would kill some of them, and approached them with an axe, threatening to cut their heads off, and raised the axe as if about to strike one of them. He resisted arrest, and in the struggle was thrown down and handcuffed. In the justice's court, judgment was rendered for defendant. On appeal to the circuit court, plaintiff recovered and defendant brings error.

MARSTON, J. A careful examination of the record fails to show that plaintiff in error has any cause of complaint. The court certainly charged the jury as to the right of an officer to make arrests without warrant for breaches of the peace, as favorably as common-law rules would warrant, and we are not at present prepared to say that an ordinance of the city of Grand Rapids could authorize arrests without process in cases not justified by common-law principles. The evidence on the part of the plaintiff tended to show that at the time of the arrest there was no disturbance, either actual or threatened, while that on the part of defendant tended to show, not merely a reasonable and probable apprehension of a violation of the ordinance, but an actual disturbance, and the jury was charged that under such circumstances, if a disturbance was found to exist, defendant was justified.

The court was requested to charge that, if there had been a breach of the peace before defendant arrived, and plaintiff was about to renew his disorderly conduct, and continue the said breach in presence of the officer, then defendant would be justified in arresting him, even though the disturbance had temporarily ceased, before defendant came on the ground; also if the jury found, as a matter of fact, that plaintiff had been guilty of a breach of the peace before defendant came where he was, and defendant knew the fact, and had reasonable and probable cause to believe plaintiff was about to renew his offense, then he was justified in arresting; also that if the officer received information from the by-standers that there had been a tumult, and that plaintiff was the cause of it, of which fact plaintiff was afterwards found guilty, and

plaintiff, in presence of defendant, made use of language indicating an intention on his part to continue the disturbance, then defendant had a right to arrest without process. These requests were refused, and, under the facts in the case, we think properly.

There are many loose general statements in the books as to the right of officers to make arrests without warrant. That they have a right to arrest for breaches of the peace committed in their presence is conceded by all. It is equally clear that they cannot arrest for a past offense, not a felony, upon information or suspicion thereof, although expressions may be found which would seem to assume such power. How far or when they may interfere by an arrest to prevent a threatened breach of the peace is not equally clear. We are of opinion that a threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts are such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made, coupled with some overt act in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer. The object of permitting an arrest, under such circumstances, is to prevent a breach of the peace, where the facts show danger of its being immediately committed.

A reference to some of the authorities may not be inappropriate. In *Reg. v. Mabel*, 9 Car. & P. 474, the jury were charged that, under the circumstances stated by the policeman, they had no authority to lay hold of the defendant, unless they were satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlor. In *Timothy v. Simpson*, 1 Crompt., M. & R. 757, the plea justifying the imprisonment alleged that an affray had been committed, and it appeared that there was danger of its immediate renewal. In *Grant v. Moser*, 5 Man. & G. 123, it was said there should be a direct allegation either of a breach of the peace committing at the time, or that a breach had been committed, and that there was reasonable ground for apprehending its renewal. In *Baynes v. Brewster*, 2 Q. B. 384, a plea to a declaration for false imprisonment was held bad which showed that the violent and illegal conduct was over, and it was not stated, nor did it appear, that it would have been repeated if the apprehension had not taken place. In this case WILLIAMS, J., said: "It is not a question, in this place, how far a constable is justified in interfering where an affray is going on in his presence; but no principle is more generally assumed than that a warrant is necessary to entitle him to interfere after the affray

is over. It is otherwise where the facts show that the affray is practically going on. That is on account of the obvious distinction, as to public danger, between a riot still raging and one no longer existing." WIGHTMAN, J., in speaking of the right to arrest during the affray, and while there is a disposition shown to resist it, quotes from *Timothy v. Simpson* as follows: "Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts." In *Wheeler v. Whiting*, 9 Car. & P. 262, PATTERSON, J., said: "The defendant pleads that the plaintiff was making a disturbance in the house, and ready and desirous to commit a breach of the peace; whereupon he gave him in charge to the policeman, to be dealt with according to law. The policeman, however, was not justified in taking him, unless he saw some breach of the peace committed. On a charge of felony it would be different;" and the learned justice doubted whether a plea which stated that the plaintiff was intending to commit a breach of the peace was good. In *Howell v. Jackson*, 6 Car. & P. 723, PARKE, B., distinctly and clearly instructed the jury that to make out the defense they must be satisfied that plaintiff had committed a breach of the peace, and that the watchman saw him do so. In *Knot v. Gay*, 1 Root, 66, it was said an arrest might be made to prevent a breach of the peace which was about to take place. In *State v. Brown*, 5 Har. (Del.) 507, it was said: "A peace-officer, such as a constable or sheriff, has the right to arrest, even without warrant, a person concerned in a breach of the peace, or other crime, or when he has reasonable ground to suspect the party of such offense." Clearly this last clause does not state the law correctly in not limiting the right to cases of felony. In *McCullough v. Com.*, 67 Pa. 32, it was said: "A constable may justify an arrest for a reasonable cause of suspicion alone;" citing in support *Russell v. Shuster*, 8 Watts & S. 309, which was a case of suspicion of felony. In *Com. v. Carey*, 12 Cush. 252, SHAW, C. J., said: "That a constable or other peace-officer could not arrest one without a warrant, for a crime proved or suspected, if such crime were not an offense amounting in law to a felony." Other cases might be referred to.

There is little danger of being misled by the cases in which it is held an officer may make arrests to prevent a threatened breach of the peace. The interposition in the case of merely threatened violence is not for the purpose of an arrest, in the ordinary sense, but as a peace-officer, to prevent a disturbance or breach of the peace, under a present menace of violence.

The judgment must be affirmed, with costs. The other justices concurred.

FOX v. GAUNT.

(3 Barnewall & Adolphus, 798.—1832.)

TRESPASS for an assault and false imprisonment. The defendant pleaded the general issue, and several other pleas, in justification: one of which was, that an evil-disposed person and common cheat, to the defendant unknown, had obtained goods from him on false pretenses; that the plaintiff afterwards, and just before the time when, etc., passed by the defendant's shop, and was pointed out to him by the defendant's servant as the person who had so obtained the goods, whereupon the defendant having good and probable cause of suspicion, and vehemently suspecting and believing that the plaintiff was the person who had committed the offense, for the purpose of having him apprehended and examined touching the same, at the time when, etc., gave charge of him to a peace officer, and requested such officer to take and keep him in custody till he should be carried before a justice, and to carry him before such justice, to be examined touching the premises, and dealt with according to law; on which occasion the peace officer, at the defendant's request, did so take him, etc., and brought him before a justice to be examined, etc.; and the justice, not being satisfied of the plaintiff's identity, discharged him out of custody, etc. Replication *de injuria*. At the trial, the defendant had a verdict on the special plea. A rule *nisi* was obtained for judgment *non obstante veredicto*, on the ground that a private person could not justify giving another into custody on suspicion of a misdemeanor.

LORD TENTERDEN, C. J. The instances in Hawkins are where the party is caught in the fact, and the observation there added, assumes that the person arrested is guilty. Here, the case is only suspicion. The instances in Hale, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor, it is much better that parties should apply to a justice of peace for a warrant, than take the law into their own hands, as they are too apt to do. The rule must be made absolute.

LITTLEDALE, PARKE and TAUNTON, JJ., concurred.

Rule absolute.

PHILLIPS V. TRULL.

(11 Johnson, 486.—1814.)

ACTION for assault and battery and false imprisonment. The declaration contained three counts; the first and second charged an assault and battery and an imprisonment for six days; the third charged an assault and battery.

Defendant pleaded (1) not guilty; (2) as to the assaulting, etc., and imprisoning the plaintiff, and detaining him in prison for the space of 10 hours, part of the time in the first count of the declaration mentioned, that the plaintiff and three other persons, being in a house occupied by one Fitch, made a great noise, affray, disturbance, and riot in the said house, in breach of the peace; and because the defendant, being a laborer and lodger in the said house, at the request of the said Fitch, in attempting to keep the peace and stop the noise, etc., was assaulted by the plaintiff, he gave charge of the said plaintiff to one Curtis to take him into his custody, and keep him until he could be carried before a justice of the peace, to answer for the said breaches of the peace; and that, at the request and by the order of the defendant, the said Curtis gently laid his hands on the said plaintiff, and took him into custody for the purposes aforesaid; but because it was midnight, and the plaintiff could not be immediately carried before a justice of the peace, he was necessarily detained in the custody of Curtis until the next day, and that he was, as soon as he conveniently could be, carried before a justice; and the defendant avers that, by means of the premises, the plaintiff was necessarily imprisoned for the space of 10 hours, part of the said time, which is the same, etc.

To this second plea the plaintiff demurred specially, because (1) it does not answer the first count of the declaration; (2) that it is no justification or bar to the action; (3) that it is double and argumentative, and in other respects uncertain, informal, and insufficient.

PLATT, J. . . . All persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders. 3 Hawk, P. C. 157, "Arrest," s. 1. So any person whatever, if an affray be made, to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders, in order to preserve the peace; but, after there is an end of the affray, they cannot be arrested without a warrant. 2 Inst. 52; Burns, Justice, 92.

Hawkins (3 Hawk. P. C. 174, b. 2, s. 20) says: "It seems clear that, regularly, no private person can, of his own authority, arrest another for a bare breach of the peace, after it is over."

We are of opinion that the special plea of justification is bad, and the plaintiff is therefore entitled to judgment on the demurrer.

Judgment for plaintiff.

TIMOTHY V. SIMPSON.

(1 Crompton, Meeson & Roscoe, 757.—1835.)

PARKE, B. This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity term last at Guildhall. The declaration was for an assault and false imprisonment; to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de injuria sua propria absque tali causa*. On the trial the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the court should be of opinion that it was not substantially proved. A rule *nisi* having been obtained to enter a verdict for the plaintiff, or judgment *non obstante veredicto*, the case was fully argued before my brothers, BOLLAND, ALDERSON, GURNEY, and myself last term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an article in the window, with a ticket apparently attached to it denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it an "imposition." Some of the shopmen desired him to go out of the shop, in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing or pretending

to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop-door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on; many persons were there, and others about the street-door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the meantime the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police-station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police-officer having, by the stat. 10, Geo. IV, c. 44, § 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in

charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest in order himself to take sureties of the peace, for he cannot administer an oath: *Sharrock v. Hannemer*; but whether he has that power, in order to take before a magistrate that he may take sureties of the peace, is a question on which the authorities differ. Lord HALE seems to have been of opinion that a constable has this power. 2 Hale's Pleas of the Crown, 89. And the same rule has been laid down at *Nisi Prius* by Lord MANSFIELD, in a case referred to in 2 East's Pleas of the Crown, 306, and by BULLER, J., in two others, one quoted in the same place, and another cited in 3 Camp. N. P. C. 421. On the other hand, there is a *dictum* to the contrary in Brooke's Abr. Faux Impt. 6, which is referred to and adopted by Lord COKE in 2d Inst. 52; Lord HOLT, in *The Queen v. Tooley*, 2 Ld. Raym. 1301, expresses the same opinion. Lord Chief Justice EYRE, in the case of *Coupey v. Henley*, 1 Esp. 540, does the same. And many of the modern text-books state that to be the law. Burns's Justice (26th ed.), Arrest, 258; Bacon's Abr. D. Trespass, 53; 2 East's Pleas of the Crown, 506; Hawkins's Pleas of the Crown, book 2, c. 13, § 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray. It is unquestionable that any by-stander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lombard, in his *Eirenarcha*, chap. 3, p. 130, says, "Any man may also stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the goal till it be known whether he, so hurt, will live or die, as appeareth by the stat. 3, Hen. VII., c. 1." In Hawk. P. C., book 1, c. 63, § 11, it is said that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice BULLER, are to be found in 9 Went. Plead. 344, 345, and DEGREY, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain

him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace-officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Lord HALE, P. C., vol. ii., p. 89. The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police-officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of the fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as, upon a review of all the circumstances, he might think fit. If no one could be restrained of his liberty in cases of mutual conflict, except the party who did the first wrong, and the by-standers acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace-officers, whose power of interposition on their own view appears not to differ from that of any of the king's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police-officer.

This brings me to the second question, whether the plea upon the record was substantially proved. I thought upon the trial that it was, but, upon further consideration, I concur with the rest of the court in thinking that it was not. The plea was as follows: "And the defendant says that before and at the said time when, &c., the said defendant was lawfully possessed of a certain dwelling-house in the city of London, and the said defendant being so possessed thereof, the said plaintiff just before the said time when, &c., entered and came into the said dwelling-

house, and then and there, with force and arms, made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the king, whereupon the defendant then and there requested the plaintiff to cease his noise and disturbance, and to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance, and affray therein, whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a certain policeman of the city of London, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with according to law; and the said policeman, so being such policeman as aforesaid, at such request of the defendant, then and there gently laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into his custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove *all*. It is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment; it is necessary to prove such of the facts *alleged* as would do so. The allegations which were proved were the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order to preserve the public peace; but the fact of an assault on the plaintiff himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling house might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof failed; but, as this is a case in which an amendment would have been allowed by virtue of the late statute, as it is clear upon the facts that there was a defense, on the ground of the defendant's right to arrest for a breach of the peace in his presence, and as the declaration of my opinion that the plea was substantially proved at the time, probably prevented an application to amend, we think that there should be

a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a *stet processus*.

*Rule accordingly.*¹

¹ As to when arrest should be made in case of misdemeanor, see *Winn v. Hobson*, 54 N. Y. Super. 330.

TRESPASS.¹

TRESPASS QUARE CLAUSUM FREGIT.

DOUGHERTY V. STEPP:

(1 Devereux & Battle's Law, 371.—1835.)

THIS was an action of trespass *quare clausum fregit*, tried at Buncome, on the last Circuit, before his Honor Judge MARTIN. The only proof

¹ "Trespass, in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property. Therefore beating another is a trespass; for which . . . an action of trespass *vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover and conversion is given by the law: . . . and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression or trespass in its largest sense; for which . . . whenever the act itself is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie; but, if the injury is only consequential, a special action of trespass *on the case* may be brought.

"But in the limited and confined sense . . . it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression." 3 Blackstone Com. 208.

"The common law provided remedies for injuries to possession and property, and based them upon possession rather than on the right of the property. The action of *detinue* at common law lay where a party claimed the specific recovery of goods and chattels, or deeds and writings detained from him. For the same purpose, however, *trover*, one of the actions on the case not requiring the exactness of description necessary for *detinue*, came into more general use. It claims damages, and is based on the innocent fiction that the defendant, having found the goods, converted them to his own use. *Replevin* could only be brought where there had been a taking by trespass, whether under color of legal process or otherwise. . . . *Trespass* was used at common law as the name of an action where the injury to the person or property was direct, as trespass *vi et armis*, for assault and battery or for false imprisonment. *Ejectment* was a species of personal action of trespass for the recovery of both land and of damages for detention of possession. *Trespass on the case* was an action arising from the statute of Westminster II., and lay for consequential injuries. *Waste* was a wrong as well as a remedy." Jaggard on Torts, 655.

introduced by the plaintiff to establish an act of trespass was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

RUFFIN, Chief Justice. In the opinion of the Court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage, or, as here, the shrubbery. Had the *locus in quo* been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now our courts have for a long time past held, that if there be no adverse possession, the title makes the land the owner's *close*. Making the survey and marking trees, or making it without marking, differ only in the degree, and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute, nor rule of reason, that will make a wilful entry into the land of another, upon an unfounded claim of right, innocent, which one, who set up no title to the land, could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial granted.

Per Curiam. Judgment reversed.

CHANDLER V. WALKER.

(21 New Hampshire, 282.—1850.)

TRESPASS *quare clausum*, for cutting and carrying away a quantity of timber from lot No. 6, in the second range of lots in Chatham, in January, 1848. Plea, the general issue.

The plaintiff had, without title, been in possession of a lot of land for thirteen years, part of which was cleared, and the remainder was a wood-lot occupied by him as a part of his farm, from which he cut his wood and timber. The lot was not fenced in on that side where the woods were, but there was a spotted line up to which he cut.

The jury returned a verdict for the whole amount of the damages, and the defendants moved to set aside and for a new trial for alleged error

in the rulings. The questions arising upon the motion were reserved, and assigned to this court for determination.

EASTMAN, J. The gist of the action of trespass *quare clausum* is the disturbance of the possession. At common law it is not properly an action to try titles, and the question of title does not necessarily arise. It may, however, and often does, where the real ownership is in dispute, and it becomes material to show in whom the rightful possession is. In South Carolina and Alabama, the action of trespass is expressly given by statute to try and settle titles to real estate. But where the matter is not regulated by statute, the decision of an action of trespass settles nothing in regard to the title beyond the action tried. Whenever the question of title is not raised, so that there is no conflict as to the true ownership, and no title, possession, or right of possession is shown on the part of the defendant, *actual* possession by the plaintiff is all that is required to sustain the action. And as against a wrongdoer,—one who has no right whatever to be upon the property,—constructive possession, accompanied with the right, is also sufficient. 1 Chitty's Pleading, 195; 5 East, 485; *Hall v. Davis*, 2 Carr. & Payne, 33; *Revett v. Brown*, 5 Bingh. 9; *State v. Newton*, 5 Blackf. 455; *Brandon v. Grinke*, 1 Nott. & McCord, 356; *Read v. Shepley*, 6 Verm. Rep. 602; *Anderson v. Nesmith*, 7 N. H. Rep. 167. In addition to the above authorities, there are numerous others which sustain the same positions; and the language of courts is substantially the same. We will instance a few of them. "Actual possession *without a legal title*, is sufficient against a wrongdoer." 1 Chitty's Pleading, 196; *Graham v. Peat*, 1 East, 244; *Chambers v. Donaldson*, 11 East, 74; *Myrick v. Bishop*, 1 Hawks's Rep. 485; *Richardson et al. v. Murrill et al.*, 7 Missouri Rep. 333. This form of action is used for the violation of the plaintiff's possession; if he be in the actual occupancy he can maintain the action *without* title. *Johnson v. McIlwain*, 1 Rice's Rep. 375; *Cahoon v. Simmons*, 7 Iredell, 189. The plaintiff is bound only to show that the land was in his possession, either actual or constructive, at the time of the alleged trespass. *Dolloff v. Hardy*, 26 Maine Rep. 554. And possession alone, although for a less term than twenty years, is sufficient to maintain an action of trespass *quare clausum*, except against one who can exhibit a legal title. *Moore et al. v. Moore*, 21 Maine Rep. 35. Possession of land is sufficient to enable a party to maintain trespass against all who can show no better title, and an entry and survey are sufficient evidence of possession against all who can show no better title. *Wendell v. Blanchard*, 2 N. H. Rep. 456; *Sinclair v. Tarbox*, 2 N. H. Rep. 135; *Concord v. McIntire*, 6 N. H. Rep. 527. So entirely does this action depend upon the disturbance of the possession, that the owner of land cannot maintain it while the premises are in the actual occupation of the tenant.

Holmes v. Seely, 19 Wendell, 507; *Anderson v. Nesmith*, 7 N. H. Rep. 167; *Robertson v. George*, 7 N. H. Rep. 306. Perhaps it may be maintained by the owner where the entry is accompanied with a *permanent* injury to the freehold. *Robertson v. George*, 7 N. H. Rep. 306. But for the cutting of grass it can only be maintained by the tenant in possession. *Bartlett v. Perkins*, 13 Maine Rep. 87. Actual possession, then, without title, or constructive possession with, is sufficient to maintain this form of action against a wrongdoer.

There is no pretense of title, possession, or right of possession, on the part of the defendants in this case. They stand in the position of mere wrongdoers; and if they can succeed, it must be because the plaintiff has failed to show himself in possession, either actual or constructive. Producing no paper title and showing no legal right of ownership to the property, the plaintiff stands solely upon his possession. Was that such as would give him a right to maintain this suit? The case finds that lots 6 and 7 were adjoining each other; No. 6 being the northerly lot, and the plaintiff's buildings being upon lot No. 7. On the north side of No. 6 was an ancient spotted line. The easterly part of that lot was cleared up to and along that line, and a fence made as far as the clearing went. This clearing was occupied as a pasture. The southerly part of this lot was cultivated; and the northwesterly part, where the trespass was committed, was wood and timber land; and the jury have found that the plaintiff had occupied that part of said lot for the last thirteen or fourteen years, up to said spotted line as a part of his farm, and as a wood and timber lot attached, and belonging to the same. The lot was not inclosed on the north, except at the easterly end, where the pasture was, but it was occupied for all the ordinary purposes of a farmer's wood lot, up to a definite and known line, just as much as though fenced. Whether such an occupancy, had it continued uninterrupted for twenty years, would have been sufficient to have gained title by adverse possession, does not necessarily arise in this case. It appears, however, to have been open, visible, and marked by definite boundaries.

But this controversy is not between parties standing in the same position. This action is not a writ of entry by which the title is to be determined. The plaintiff shows the ordinary and common possession of like property in most instances, while the defendants show no possession or title whatever, either in themselves or others. Many wood-lots are not fenced for a long series of years; and where the possession is known, and marked, and uninterrupted, it is not necessary that the property should be inclosed, in order to maintain an action of trespass *quare clausum* against a mere wrongdoer. Some cases are very direct upon this point. *Catteris v. Cowper*, 4 Taunton's Rep. 546, is one of them. In that case, it being proved, that the defendant had entered the land

and taken the produce, the question was made whether the plaintiff had proved such a possession of the *locus in quo* as would enable him to maintain the action. The *locus in quo* was a piece of waste land lying between the farm which the plaintiff rented, and the river Ouse. It bore grass, which everyone cut who pleased, until within two years before the action; and the plaintiff's only title was, that two years before he had taken possession, and twice mowed the grass, and had since pastured a cow there. The defendant's testimony was, that the first time the plaintiff cut the grass he boasted that he had cut hay off of land for which he had paid neither rent nor taxes; that in a former year the plaintiff bought the hay cut by another man off from this same land; and that a few years before the trial, in repairing the boundary-fence of his farm, he excluded, by his fence, the land in question, and had frequently shown to other persons the boundaries of his farm as excluding this land. The court held the defendant's evidence insufficient to disprove the plaintiff's title, and that there was sufficient evidence of possession on the part of the plaintiff to maintain the action against a wrongdoer. The marginal note to this case is as follows: "Mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover as plaintiff, against all the world except such as can prove an older and better title in themselves." In *Barnstable v. Thatcher et al.*, 3 Metcalf, 239, it was held, that an entry upon a piece of waste cranberry land, and putting up stakes about it, and notices upon the stakes that possession had been taken, was a sufficient possession, without any other title, to maintain trespass, except against the right owner, or the person having the prior right of possession. And it is further said, in that case, that "to maintain an action of trespass, it is not necessary to have such a possession as amounts in law to a disseisin." To the same effect is *Cook v. Rider*, 16 Pick. 186. In *Townsend v. Kerns et al.*, 2 Watts, 180, it is said, that trespass is emphatically an action founded on possession, and the defendant cannot rely upon the plaintiff's want of title. In *Machin v. Geortner*, 14 Wendell, 239, the plaintiff proved that he occupied the *locus in quo* as a wood-lot, cutting thereupon his wood, and rails for fencing, and some saw-logs; but the lot was not fenced, nor was there any clearing upon it, nor did he produce any title to it. The defendant thereupon moved for a nonsuit, because the plaintiff had failed to prove himself in *actual* possession of the *locus in quo*. The motion was overruled; the court holding, that proof that the premises were used as a wood-lot, was sufficient evidence of actual possession to maintain the action against a person showing no rights. And in *Penn et al. v. Preston*, 2 Rawle, 14, the court say, "possession of a farm draws to it the possession of the woodland belonging to it, *though not inclosed*; and the party in possession may maintain trespass against a wrongdoer for destroying timber on such woodland."

Looking, then, at the nature of this form of action, the purposes for which it is used, and the authorities upon the subject, as applicable to the facts presented in this case, we cannot doubt that the rulings of the court below, and the instruction given to the jury, were correct.

In examining the case, we have not considered the question whether the declaration was broad enough to cover the *locus in quo*, or not, because that question, not being raised at the trial, but it appearing that the case was tried mainly upon the fact of possession, it is too late to take that exception now. If an objection on account of variance between the declaration and the proof be not taken at the trial, it will be considered as waived. *McCombe v. Sawyer*, 12 N. H. Rep. 396.

Judgment on the verdict.

HAY V. THE COHOES CO.

(2 New York, 159.—1849.)

THE declaration alleged, among other things, that the defendants, by their agents and servants, wrongfully and unjustly blasted and threw large quantities of earth, gravel, slate and stones, upon the dwelling house and premises of the plaintiff, to his damage. Plea, not guilty. On the trial, the plaintiff gave evidence tending to prove his declaration. The defendants moved for a nonsuit on the ground that it was incumbent on the plaintiff to aver and prove negligence, unskillfulness, or wantonness on the part of the defendants, and this the plaintiff had failed to do. The motion was granted, and an exception taken. On error brought, the Supreme Court reversed the judgment and granted a new trial (3 Barb. 42), from which decision the defendants appealed to this court.

GARDINER, J. The defendants insist that they had the right to excavate the canal upon their own land, and were not responsible for injuries to third persons, unless they occurred through their negligence and want of skill, or that of their agents and servants.

It is an elementary principle in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others—otherwise it might be made destructive of their rights altogether. Hence the maxim *sic utere tuo*, &c. The defendants had the right to dig the canal. The plaintiff the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two,

since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. *Aldred's Case*, 9 Coke, 58. He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner.

In Rolle's Abridgment, 565, it is said that if A erects a new house upon the confines of his land, and next adjoining the land of B, and B afterwards digs his land so near the land of A that it falls, no action can be sustained by A. The purpose of B in the case cited, in digging upon his own land, was lawful, and so for aught that appears were the means taken to accomplish it. The right of A to occupy, and use his land in a particular manner was qualified and limited by a similar right in B. No action consequently could be sustained. "A man however cannot dig his land so near mine," the reporter adds, "as to cause mine to slide into the pit." In the last case, the injury would consist in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit owner, would, I apprehend, justify the transfer of a portion of another man's land to his own.

So in all that class of cases where the mode of enjoyment is turned into an absolute right by custom, grant, or prescription, the party is entitled to protection against any alteration of the adjacent premises by which he may in any way be injured. *Lasala v. Holbrook*, 4 Paige, 173, and cases cited. In *Panton v. Holland*, 17 John. 92, the parties were owners of contiguous building lots, in the city of New York. The defendant in order to lay a foundation for a dwelling house, dug below the foundation of the plaintiff's house, in consequence of which, it settled

and the walls cracked. Held that the defendant was not liable without proof of negligence. In other words, the plaintiff was bound to show that the means adopted by the defendant were illegal. *Clark v. Foot*, 8 John. 421, is to the same effect. If with the same purpose in view, the defendant had placed earth upon or transported it across the plaintiff's lot, the means, *per se*, would be wrongful.

In this case, the plaintiff was in the lawful possession and use of his own property. The land was his, and, as against the defendant, by an absolute right from the centre *usque ad coelum*. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises, *Morley v. Pragnall*, Cro. Car. 510, nor abstract any portion of the soil, Rol. Abr. 565, note; 12 Mass. 221, nor cast anything upon the land, *Lambert v. Bessy*, Sir T. Raymond, 421, by any act of their agents, neglect, or otherwise. For this would violate the right of domain. Subject to this qualification the defendants were at liberty to use their land in a reasonable manner, according to their pleasure. If the exercise of such a right upon their part, operated to restrict the plaintiff in some particular mode of enjoying his property, they would not be liable. It would be *damnum absque injuria*.

No one questions that the improvement contemplated by the defendants upon their own premises was proper and lawful. The means by which it was prosecuted were illegal notwithstanding. For they disturbed the rightful possession of the plaintiff and caused a direct and immediate injury to his property. For the damages thus resulting, the defendants are liable. Without determining the other questions discussed upon the argument, we think, upon the ground above stated, that the judgment of the Supreme Court should be affirmed.

Judgment affirmed.

JUSTIFIABLE ENTRIES.

NEWKIRK V. SABLER.

(9 Barbour, 652.—1850.)

ACTION for assault and battery.

The plaintiff had sent his servant, with a team and wagon, across the farm of the defendant, upon which he entered by taking down the bars, to the house of one Roosa, after the defendant had forbidden the plaintiff's crossing his lands. On the return of the team to the place where it had entered, the bars were found fastened, by boards nailed

over them. The servant, after an ineffectual attempt to get through, left the team and wagon on the defendant's land, and went and informed the plaintiff, who came and commenced tearing down the fence for the purpose of taking away his property. The defendant forbade the plaintiff's taking down the fence, but the latter persisting in his attempt, the defendant struck him or struck at him, and a fight ensued, in which the plaintiff received the injuries complained of.

The judge substantially charged the jury that the plaintiff had the right to remove his team and wagon from the defendant's premises, provided he did so with the least possible injury to the premises, and in nowise wantonly and unnecessarily destroyed the defendant's fences. Defendant excepted.

Verdict for plaintiff. Defendant appealed.

By the Court, PARKER, J. I think the learned justice erred in holding that the plaintiff had a right to enter upon the lands of the defendant for the purpose of regaining possession of his property.

The right to land is exclusive; and every entry thereon, without the owner's leave, or the license or authority of law, is a trespass. 3 Bl. Com. 209; 18 Johns. 385. There is a variety of cases where an authority to enter is given by law; as to execute legal process; to distrain for rent; to a landlord or reversioner, to see that his tenant does no waste, and keeps the premises in repair according to his covenant or promise; to a creditor, to demand money payable there; or to a person entering an inn for the purpose of getting refreshment there. 3 Black. Com. 212; 1 Cowen's Tr. 411. In some cases, a license will be implied; as if a man make a lease, reserving the trees, he has a right to enter and show them to the purchaser. 10 Co. 46. Where the owner of the soil sells the chattel being on his land. As if he sell a tree, a crop, a horse, or a fanning mill, which remain within his close; he at the same time passes to the vendee, as incident to such sale, a right to go upon the premises and take away the subject of his purchase, without being adjudged a trespasser. 1 Cowen's Tr. 367; Bac. Abr. Trespass F.; 11 East, 366; 2 Roll. Abr. 567 m. n. 1. And if a man, in virtue of his license, erects a building on another's land, this license cannot be revoked so entirely as to make the person who erected it a trespasser, for entering and removing it after the revocation. In some cases, the motive will excuse the entry. If J. S. go into the close of J. N. to succor the beast of J. N., the life of which is in danger, an action of trespass will not lie; because, as the loss of J. N., if the beast had died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or spoiled, the action of trespass lies; for the loss, if either of those things had happened, would not have been irremediable.

Bac. Abr. Trespass F. And if a stranger chase the beast of A which is *damage feasant* therein, out of the close of B, trespass will lie; for by doing this, although it seem to be for his benefit, B is deprived of his right to distrain the beast. Bro. Tresp. pl. 421; Keilw. 46, 13.

In some cases the entry will be excused by necessity. As if a public highway is impassable, a traveler may go over the adjoining land. 2 Show. 28; Lev. 234; 1 Ld. Raym. 725. But this would not extend to a private way; for it is the owner's fault if he do not keep it in repair. Doug. 747; 1 Saund. 321. So if a man who is assaulted, and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for the preservation of his life. Year Book, 37 H. VI., 37 pl. 26. If my tree be blown down and fall on the land of my neighbor, I may go on and take it away. Bro. Tres. pl. 213. And the same rule prevails where fruit falls on the land of another. *Miller v. Fawdry*, Latch. 120. But if the owner of a tree cut the loppings so that they fall on another's land, he cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it. Bac. Abr. Trespass F.

Sometimes the right of action depends on the question which is the first wrongdoer. If J. S. have driven the beast of J. N. into the close of J. S., or if it have been driven therein by a stranger, with the consent of J. S., and J. N. go thereinto and take it away, trespass will not lie because J. S. was himself the first wrongdoer. 2 Roll. Abr. 566, pl. 9; Cro. Eliz. 329. Tested by that rule, the plaintiff in this suit certainly has no right of action; for he was the first wrongdoer. But it is well settled that where there is neither an express nor an implied license, nor any such legal excuse as is above stated, a man has no right to enter upon the land of another for the purpose of taking away a chattel being there, which belongs to the former. The mere fact that the plaintiff owns the chattel, gives him no authority to go upon the land of another to get it. In *Heermance v. Vernoy*, 6 John. Rep. 5, where A had entered upon the land of B without his permission, to take a chattel belonging to A; it was held to be a trespass. So in *Blake v. Jerome*, 14 John. Rep. 406, a mare and colt were taken out of the plaintiff's field, by a person who acted under the orders and direction of the defendant, after they had been demanded by the defendant and refused to be delivered to him; and after he had been expressly forbidden to take them; and the defendant was held to be guilty of a trespass.

In this case, the plaintiff's horses and wagon were on the lands of the defendant, where they had been left by the servant of the plaintiff. They were not there by the defendant's permission. On the contrary, the plaintiff had been guilty of a trespass in sending his team across the lands of the defendant, after he had been forbidden to do so. And I think the defendant had the right to detain them, before they

left the premises, and to distrain them *damage feasant*. 2 Rev. Stat. 427. But it is not necessary to decide, whether the defendant detained the property rightfully or wrongfully.

The plaintiff attempted to enter upon the lands of the defendant and against his will, for the purpose of taking away his property. This he had no right to do, even though his property were unlawfully detained there. If the plaintiff could not regain the possession of his property peaceably, he should have resorted to his legal remedy, by which he could, after demand and refusal, have recovered either the property itself or its value. He had no right to redress himself by force. 1 Black. Com. 4. In pursuing his object, the plaintiff tore down the defendant's fence after he had been forbidden to enter, and after he had been ordered by the defendant to desist. The defendant had a right to protect himself in the enjoyment of his possession and his property, by defending them against such aggression. 8 T. R. 88, 299; 1 Saund. 296, note 1; 1 Salk. 641; 1 Bing. 158; 3 Black. Com. 5.

The defendant cannot be held liable for the injuries inflicted upon the plaintiff, on the occasion in question, unless he used more force than was necessary for the defense of his possession; and it seems he did not use enough to prevent the plaintiff's effecting his forcible entry and taking away the property. But that was a question proper to be submitted to the jury.

The judgment of the circuit court must be reversed, and a new trial awarded; costs to abide the event.

CAMPBELL V. RACE.

(7 Cushing, 408.—1851.)

THIS was an action of trespass for breaking and entering the plaintiff's close in the town of Mount Washington, and was tried in the Court of Common Pleas, before BYINGTON, J. The defendant pleaded the general issue, and specified in defence a right of way of necessity, resulting from the impassable state of the adjoining highway, by obstructions with snow.

The defendant introduced evidence that at the time when the trespass was alleged to have been committed he was travelling with his team on a highway running east and west which led to and intersected a highway running north and south, which latter highway led to and intersected another highway, on which the defendant had occasion to go with his team; and the usual, proper and only mode of getting on which, by a highway, was by passing over the two highways first named,

when they were in a condition fit for travel; but at the time of the alleged trespass, they were both obstructed, and rendered impassable by snow-drifts; because of which obstructions, the defendant turned out of the first highway with his team, at a place where it was rendered impassable as aforesaid, and passed over the adjoining fields of the plaintiff, doing no unnecessary damage, and returned into the second highway, as soon as he had passed the obstructions which rendered both impassable. And he contended, that the highways being thus rendered impassable, he had a way of necessity over the plaintiff's adjoining fields, or that his so passing was excusable, and not a trespass.

But the judge ruled, that these facts constituted no defence to the action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books. 2 Bl. Com. 36; Woolrych on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38; and it is fully supported by the adjudged cases. *Henn's Case*, W. Jones, 296; 3 Salk. 182; 1 Saund. 323, note 3; *Absor v. French*, 2 Show. 28; *Young v. ———*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 M. & S. 387, 393. Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitled his opinion to very great weight, adopts the rule, as declared in the leading case of *Taylor v. Whitehead*, *ubi supra*, which he says "is the latest on the point, and settles the law." 3 Dane Ab. 258. And so Chancellor Kent states the rule. 3 Kent Com. 424. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well settled law. *Holmes v. Seely*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Barb. 652. These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without ob-

jection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised, that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is, by turning out of the usually travelled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person travelling on a highway, is in the

exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attach to a highway through private property, it must be assumed that the right to the use of land adjoining the road was taken into consideration, and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed for the private injury which might thereby be occasioned.

* * * * *

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity,—*cessante ratione cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when by the exercise of due care, after notice of obstructions, other ways may be selected, and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes, which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed which would justify or excuse the traveller. In the case at bar this question was wholly withdrawn from the consideration of the jury by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas.

Exceptions sustained.

GILES v. SIMONDS.

(15 Gray, 441.—1860.)

ACTION of tort for breaking and entering plaintiff's close, and cutting trees standing thereon. Defendant justified under an oral contract of sale of the trees. The price had been paid, and part of the trees had been cut and removed, when plaintiff revoked his license to go upon the land. The jury found a verdict for defendant. Plaintiff alleged exceptions.

BIGELOW, J. If the plaintiff had a right to revoke the license to enter upon his land, under which the defendant seeks to justify the acts of trespass alleged in the declaration, it is entirely clear that the verdict rendered in favor of the defendant cannot stand. The decision of the case turns, therefore, on the question whether an owner of land, who has entered into a verbal contract for the sale of standing wood and timber to be cut and severed from the freehold by the vendee, can, at his pleasure, revoke the license which he thereby gives to the purchaser to enter on his land, and cut and carry away the wood or timber included in the contract. That such a contract is not invalid as passing an interest in the land is too well settled to admit of doubt.¹ It is only an executory contract of sale, to be construed as conveying an interest in the trees when they shall be severed from the freehold, and shall become converted into personal property. Nor does the permission to enter on the land, which such a contract expressly or by implication confers on the vendee, operate to create or vest in him any estate or interest in the premises. It is only a license or authority to do certain acts on the land, which but for such license or authority would be acts of trespass. If it were otherwise, if under such a contract a right were conferred on the vendee to enter on the land, and then to exercise a right or privilege at his own pleasure, free from the control of the owner of the land, during the continuance of the contract, it would clearly confer on the vendee a right or interest in the premises, which would contravene the statute of frauds. Rev. St. c. 74, § 1. There can be no doubt that a valid license to enter on land may be given by parol. But this rule rests on the distinction that a license is only an authority to do an act, or series of acts, on the land of another, and passes no estate or interest therein.

The nature and extent of the right or authority conferred by a license, and how far it is within the power of the licensor to modify or revoke it, have given rise to much discussion and many nice and subtle distinc-

¹ See Erwin's Summary of Sales, p. 130.

tions in the books, as well as conflicting decisions in the courts of common law. Certain principles, however, seem now to be well settled. If the owner of land sells chattels or other personal property situated on his land, the vendee thereby obtains an implied license to enter on the premises, and take possession of and remove the property. In such case the license is coupled with and supported by a valid interest or title in the property sold, and cannot be revoked. *Wood v. Manley*, 11 Adol. & E. 34; *Heath v. Randall*, 4 Cush. 195. So, too, if the owner of chattels or other personal property, by virtue of a contract with or the permission of the owner of land, places his property on the land, the license to enter upon it, for the purpose of taking and removing the property, is irrevocable. *Patrick v. Colerick*, 3 Mees. & W. 483; *Russell v. Richards*, 10 Me. 429, Id., 11 Me. 371; *Smith v. Benson*, 1 Hill, 176. The right of property in the chattels draws after it the right of possession. The license to enter on land to obtain possession of them is subsidiary to this right of property, which cannot be enjoyed if the license be withdrawn or terminated. This right in the chattels is not derived from the license, but exists in the owner by virtue of a distinct and separate title, the validity of which in no way depends on any right or interest in the land. But, with the assent of the owner of the land, the property has been placed in a situation where it cannot be used or enjoyed except by a license to enter upon his land. The continuance of this license is therefore essential to the enjoyment of the right. It would be a manifest breach of good faith to permit such a license to be revoked. No man should be permitted to keep the property of others by inducing them to place it upon his land, and then denying them the right to enter to regain its possession. A party is therefore not permitted to withdraw his consent, by setting up his title to the land, after it has been acted on by others, and when their rights will be impaired or lost by its withdrawal. In like manner, and for similar reasons, a license to enter on land for the purpose of removing trees or timber therefrom, which have been felled in pursuance of a contract of sale, cannot be recalled. So far as it has been executed, the license is irrevocable. By virtue of the contract, and with express or implied consent of the owner of the soil, the vendee has been induced to expend his money and services. The trees, so far as they have been severed from the freehold, have been converted into personal property, and vested in the vendee. A revocation of the license would, to the extent to which it has been executed, operate as a fraud on the vendee, and deprive him of property to which he had become legally entitled. Besides, the owner of the land cannot, by a subsequent revocation of his license, render that unlawful which, with all its incidents and necessary consequences, was lawful at the time it was done, by virtue of his own authority and consent.

The true distinction between an executory verbal license to enter on

land under a contract for the sale of timber or trees growing thereon, and a similar license executed, seems to be this: The former confers no vested interest or property, no money or labor is expended on the faith of it, and no right or title is impaired or lost by its revocation. If the party to whom it is granted is injured by its withdrawal, his remedy is by an action against the licensor for a breach of the contract. It cannot be held to extend further, so as to confer a right to use the land of another without his consent, because it would thus confer, *ex proprio vigore*, an interest in land, which cannot be created except by a writing. But such a license executed, to the extent to which it has been acted on, has operated to induce the vendee to expend money and services on the property, and thereby to convert it into personal chattels which have become vested in him. The revocation of the license in such case would deprive the vendee of his property. It has therefore been held that such a license, while it is executory, may be countermanded, but that when executed it becomes irrevocable. *Cook v. Stearns*, 11 Mass. 533; *Cheever v. Pearson*, 16 Pick. 273; *Ruggles v. Lesure*, 24 Pick. 190; *Claffin v. Carpenter*, 4 Met. 580; *Nettleton v. Sikes*, 8 Met. 34.

Applying these principles to the case before us, it is clear that the defendant could not justify the acts of trespass charged in the declaration. Before his entry on the land for the purpose of cutting trees, the plaintiff revoked the license which he had given by the verbal contract of sale under which the defendant claimed to act. So far as the license was executory, it was revocable, and the entry of the defendant after its revocation was unlawful.

The view which we have taken of the case seems to render a decision of the other questions raised by the exceptions unnecessary.

Exceptions sustained.

PLOOF V. PUTNAM.

(81 Vermont, 471.—1908.)

DEFENDANT'S demurrer to the declaration was overruled, and defendant excepted.

MUNSON, J. It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children;

that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that, to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries. This claim is set forth in two counts—one in trespass, charging that the defendant by his servant with force and arms willfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of his duty, negligently, carelessly, and wrongfully unmoored the sloop. Both counts are demurred to generally. There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine.

In *Miller v. Fandrye*, Paph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that, as soon as the sheep were off his land, he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground; but the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that, as the defendant had done his best to recall the dog, trespass would not lie. In trespass of cattle taken in A., defendant pleaded that he was seised of C. and found the cattle there *damage feasant*, and chased them towards the pond, and they escaped from him and went into A., and he presently retook them; and this was held a good plea. 21 Edw. IV., 64; Vin. Ab. Trespass, H. a, 4, pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Ab. Trespass, K. a, pl. 1. A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity. *Henn's Case*, W. Jones, 296; *Campbell v. Race*, 7 Cush. (Mass.) 408; *Hyde v. Jamaica*, 27 Vt. 443 (459); *Morey v. Fitzgerald*, 56 Vt. 487. An entry upon land to save goods which are

in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII., 27; Vin. Ab. Trespass, H. a, 4, pl. 24, K. a, pl. 3. In *Proctor v. Adams*, 113 Mass. 376, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea; and it was held no trespass. See, also, *Dunwich v. Sterry*, 1 B. & Ad. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII., pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In *Mouse's Case*, 12 Co. 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took 47 passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge that, if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss to safeguard the life of a man. It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence of the charge.

The defendant insists that the counts are defective, in that they fail to show that the servant in casting off the rope was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not imply authority to do

an unlawful act, and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "willfully, and designedly" in one count, and "negligently, carelessly, and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Ency. P. & Pr. 922; *Voegeli v. Pickel, Marble, etc., Co.*, 49 Mo. App. 643; *Wabash Ry. Co. v. Savage*, 110 Ind. 156. See, also, *Palmer v. St. Albans*, 60 Vt. 427.

Judgment affirmed and cause remanded.

TRESPASS AB INITIO.

SIX CARPENTERS' CASE.

(8 Coke, 146, a.—1610.)

IN trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1st. September, 7 Jac., in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, etc., and upon the new assignment, the plaintiff assigned the trespass in a house called the "Queen's Head." The defendants to all the trespass *præter fractionem domus* pleaded not guilty, and as to the breaking of the house, said that the said house *præd' tempore quo*, etc., *et diu antea et postea*, was a common wine tavern, of the said John Vaux, with a common sign at the door of the said house fixed, etc., by force whereof the defendants, *præd' tempore quo*, etc., viz., *hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, etc. The plaintiff, by way of replication, did confess that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same:

upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment upon request, is a denying in law) makes the entry into the tavern tortious.

And, first, it was resolved when an entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*: but where an entry, authority, or license, is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is, that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*. Vide 11 H. 4, 75 b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain *damage-feasant*; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. Vide 12 E. 4, 8 b. 21 E. 4, 19 b. 5 H. 7, 11 a. 9 H. 6, 29 b. 11 H. 4, 75 b. 3 H. 7, 15 b. 28 H. 6, 5 b. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for *damage-feasant*, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree, in these, and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful: but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. *Et sic de similibus*.

2. It was resolved *per totam Curiam*, that not doing, cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass; and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*; and therewith agrees 33 H. 6, 47 a. So if a man takes cattle *damage-feasant*, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 *g. temp.* E. 1. Replevin, 27. 27 E. 3, 88. 45 E. 3, 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point 12 Edw.

4, 9 b. For there PIGOT, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which BRIAN, Chief Justice, said, the said case which Pigot has put, is not law, for it is no trespass, but the taverner shall have an action of debt: and there before BRIAN held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have a special action of debt: *scil.* that A. did put cloth to him to make a gown thereof for the said A., and that A. would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor overvalues the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessaries thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so especially agreed. But in such case he may detain the garment until he is paid, as the hostler may the horse. *Vide* Br. Distress, 70, and all this was resolved by the court. *Vide* the book in 30 Ass. pl. 38, *John Matrever's case*, it is held by the court, that if the lord or his bailiff comes to distrain, and before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for *damage-feasant*, if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3, 8 v, in the *Mr. of St. Mark's case*; and so is the opinion of HULL to be understood in 13 H. 4, 17 b, which opinion is not well abridged in title Trespass, 180. Note, reader, this difference that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking wrongful: tender after the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *detinue* for the detainer after; or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods; and therewith agree the said books in 13 H. 4, 17 b; 14 H. 4, 4; *Registr' Judic'*, 37; 45 E. 3, 9, and all the books before. *Vide* 14 Ed. 4, 4 b; 2 H. 6, 12; 22 Hen. 6, 57; Doctor and Student, lib. 2, cap. 27; Br. Distress, 72,

and *Pilkington's case*, in the fifth part of my Reports, fol. 76, and so all the books which *prima facie* seem to disagree, are upon full and pregnant reason well reconciled and agreed.

ALLEN v. CROFOOT.

(5 Wendell, 506.—1830.)

CROFOOT sued Allen, in a justice's court, in trespass, for entering his house and obtaining copies of papers for the purpose of commencing a suit against him. The defendant pleaded the general issue and license to enter the house. The jury returned a verdict for the plaintiff, and the justice gave judgment accordingly. The defendant appealed to the Common Pleas, and at the trial the following facts appeared: There had been an arbitration between one Parsons and Crofoot, and an award had been made in favor of the former. Allen was the attorney for Parsons, and on receiving from Crofoot the sum of money awarded, delivered up to him his bond and the award. At the time of payment, something was said about further claims that Parsons had against Crofoot, which the latter said he would not pay. Allen thinking he had done wrong in delivering up the bond and award, went to Crofoot's house in his absence to take copies of the bond and award, under the pretense that he was subpoenaed as a witness and wanted to refresh his memory as to the transactions, when in fact his object was to obtain copies for the purpose of commencing a suit against Crofoot, which was subsequently commenced. It further appeared, that when he went to Crofoot's house, he knocked at the door and was bidden to come in; and that he was on terms of intimacy with Crofoot, and in the habit of resorting to his house. The court charged the jury, that if they should be of opinion that the defendant had acted unfairly or improperly in obtaining copies of the papers, and had gone to the plaintiff's house with the intention of fraudulently obtaining such copies, though he had leave to enter the house, they should find for the plaintiff; but if he acted correctly and openly, and had leave to enter the house, they should find for the defendant. The defendant excepted to this charge. The jury found a verdict for the plaintiff, and the defendant sued out the present writ of error.

By the Court, SAVAGE, CH. J. The plaintiff in error seeks to reverse the judgment in the common pleas on two grounds.

1. It is said the common pleas had no jurisdiction because the penalty of the appeal bond was not in double the amount of the judgment. The

judgment was entered according to the justice's return for \$50 damages and the costs of suit. As no sum is mentioned for costs, and the only sum mentioned is the \$50, this court cannot say that the judgment was entered for a greater sum. The penalty, therefore, is correct. The bond was incorrect in not containing the latter condition mentioned in the statute; but the plaintiff below had no reason to complain on that account, as the bond is more favorable to him in its present form than if that condition was contained in it. There is now an absolute undertaking to pay, whereas by the condition omitted, the surety would be obligated to pay the debt before the justice, with interest and costs, or surrender the body of the defendant.

2. It is also urged by the plaintiff in error, that the court below erred in charging the jury that the action was sustainable, if they should find that the defendant entered the plaintiff's house fraudulently, to obtain improperly copies of papers in the absence of the plaintiff. It was decided in *The Six Carpenters' Case*, 4 Co. 290, that where an authority to enter upon the premises of another is given *by law*, and it is subsequently abused, the party becomes a trespasser *ab initio*; but where such authority or license is given *by the party*, and it is subsequently abused, the party guilty of the abuse may be punished, but he is not a trespasser; and the reason of the difference is said to be, that in case of a license by law, the subsequent tortious act shows *quo animo* he entered; and having entered with an intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority. Whether this is not a distinction without a difference of principle, it is not necessary to inquire. A better reason is given for it in Bacon's Abr. tit. Trespass, B. Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith. It is contended that the license being obtained by fraud was void. The defendant knocked at the door and was told to walk in; he was found copying certain papers; but how he obtained them, on what representation, or from whom, the evidence does not disclose. One witness does indeed testify that he said he would not have got the copies, if he had not practiced a deception on the wife and brother-in-law of the plaintiff. If this declaration should be considered evidence of his having made improper representations to obtain the papers, then the question arises, does he thereby become a trespasser *ab initio*?

It has been decided that to enter a dwelling house without license, is in law a trespass, 12 Johns. R. 408, and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place, 15 Johns. R. 186; and it is argued that as fraud vitiates everything into which it enters, a license to enter the house fraudulently obtained is void, and as *no license*. The principle of relation has never been applied to such a case, nor is it necessary for the purposes of justice to extend it farther than to cases where the person enters under a license given him by *law*. In such cases, as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies.

The judgment must be reversed without costs and a *venire de novo* awarded by Cortland common pleas.

MALCOLM V. SPOOR.

(12 Metcalf, 279.—1847.)

SHAW, C. J. This was an action of trespass, in which the plaintiff declared against the defendant for breaking and entering her house, etc. The defendant justified under a writ directed to him, as constable, and commanding him to attach the plaintiff's household furniture.

The case comes before us on exceptions, from which it appears that the defendant was a constable, and that he entered the plaintiff's house, having a writ against her, and attached her furniture; that he took with him into the house a man who was intoxicated, whom he made keeper of the attached furniture, and left in the house in charge of the furniture, although the plaintiff objected to his remaining there as keeper, on account of his intoxication.

The exceptions also set forth the violent conduct of the keeper, and other matters, which are not material to the decision of the question that is brought before us.

The Court of Common Pleas, in which the trial was had, instructed the jury that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, this was such an abuse of his authority as made him a trespasser *ab initio*; and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict was returned for the plaintiff; and the question whether these instructions were right has been submitted to us without argument.

It has been held as a rule of the common law, ever since the *Six Car-*

penters' Case, 8 Co. 146, that where one is acting under an authority conferred by law, an abuse of his authority renders him a trespasser *ab initio*. *Melville v. Brown*, 15 Mass. 82. In the case before us, the defendant had authority by law to enter the plaintiff's house, to serve legal process; but placing there an unfit and unsuitable person, to keep possession of the attached goods in his behalf, until he could remove them, against the remonstrance of the plaintiff, was an abuse of his authority, which rendered him liable as a trespasser *ab initio*.

An officer cannot legally stay in another's building, to keep attached goods therein, nor authorize any other person to remain therein, as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser. See *Rowley v. Rice*, 11 Met. 337.

Exceptions overruled.

ADAMS v. RIVERS.

(11 Barbour, 390.—1851.)

• ACTION for trespass. The plaintiff declared that he was in possession of premises bounded by streets on two sides; that he owned to the middle thereof, subject to an easement in the public; that defendant came upon the sidewalk of the plaintiff and remained there a considerable time, using offensive, vulgar and vile language towards plaintiff.

The plaintiff proved his cause. Defendant moved for a nonsuit, upon the ground (among others) that the *locus in quo* was a *public street*, and the plaintiff had not proved any damages. The defendant also moved to strike out the testimony of the conversation and acts done by the defendant in the highways, which motion was denied. There was a verdict for plaintiff, and the defendant appealed to the county court, which court reversed the judgment. One ground of reversal was the improper reception of the evidence of the language and conversation of the defendant on the sidewalks of public streets.

Thereupon, the plaintiff brought this appeal to the Supreme Court.

WILLARD, P. J. . . . The plaintiff proved, *prima facie*, that he owned and possessed both the lots mentioned in the complaint. These lots being bounded by public streets, extended to the centre of the street. This is undoubtedly the legal presumption. In *Adams v. The Saratoga and Washington Railroad Co.* just decided by this court, 11 Barb. 414, all the leading cases are collected. 2 Kent's Com. 433; 2

Johns. 363; 1 Wend. 270; 2 Id. 473; 8 Id. 106; 11 Id. 486; 4 Paige, 513; 12 Wend. 98; 15 John. 447; 2 Smith's Leading Cases by Hare and Wallace, 173 and note; 2 Str. 1004. I shall assume that to be the law, without a more extended review of the cases. As was well remarked by Justice Cowen in *Pearsall v. Post*, 20 Wend. 121, the relative rights both of owner and passenger in a highway, are well understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman cannot stop to graze his steed, without being a trespasser; it is only in case of inevitable, or at least accidental detention, that he can be excused even in halting for a moment.

This brings us to the main question in the case, whether the defendant by using abusive and insulting language to the plaintiff, became a trespasser from the beginning. The testimony authorized the jury to find that the defendant came on to the premises of the plaintiff, covered by the street, not in the legitimate use of the highway as a place of travel, but for the express purpose of abusing him. The opprobrious language used by the defendant was not actionable as slanderous. It was highly provoking and tended directly to a breach of the peace. It was received in evidence merely to show that the defendant was a trespasser, having forfeited his privilege by a gross abuse of it; and not indirectly to recover damages before the justice, for actionable words. It is conceded that the justice had no jurisdiction of an action of slander.

The general doctrine as laid down in the *Six Carpenters' Case*, 8 Co. 146, a, is that when an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but when an entry, authority or license is given by the party, and he abuses it, then he must be punished for the abuse, but shall not be a trespasser *ab initio*. In accordance with this distinction, it is held that if a man enters an inn or tavern, and subsequently commits a trespass; if the lord who distrains for rent, or the owner for *damage feasant*, works or kills the distress; or if he who enters to see waste, breaks the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases the law adjudges that he entered for that purpose; and because the *act which demonstrates it is a trespass*, he shall be a trespasser *ab initio*. *Six Carpenters' Case, supra*.

In all the cases put by Coke, the acts complained of as abuses of the power, were distinct acts of trespass. And it seems to be the better opinion that a man cannot become a trespasser *ab initio*, by any act or omission, which would not itself, if not protected by a license, be the subject of trespass. Thus in *Shorland v. Govett*, 5 B. & C. 485, the sheriff's officer justified a trespass under a *fi. fa.*, and it was held that a demand by the officer of more than was due by the warrant, did not make him a trespasser from the beginning. The reason is, that the original levy

was lawful, and extortion is not an act for which trespass will lie. In *Gates v. Lounsbury*, 20 John. 429, SPENCER, Ch. J., says that where an act is badly done, it cannot be made illegal *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act. And the same learned judge in *Gardiner v. Campbell*, 15 John. 402, recognizes the distinction in the *Six Carpenters' Case*, between the *actual* and *positive* abuse of a thing, taken originally by authority of the law, and a mere *nonfeasance*, such as a refusal to deliver an article distrained. And BRONSON, J., affirms the same principle in *Hale v. Clark*, 19 Wend. 498, that a mere nonfeasance will never make a man a trespasser from the beginning; some act is required to be shown. The same doctrine is recognized by elementary writers. 2 Leigh's N. P. 1445. 2 Phil. Ev. 197, 198. 1 Smith's Leading Cases by Hare and Wallace, 165, 166.

The case of *Adams v. Adams*, 13 Pick. 384, establishes the doctrine that the *omission* of a distrainer to afford proper food and water to distrained cattle, made the distrainer a trespasser from the beginning. And in *Bond v. Wilder*, 16 Verm. R. 399, the *neglect* of an officer to sell goods advertised under an execution, in pursuance of his advertisement, was held to work the same consequence. Both these cases are believed to be a departure from the English law, and they certainly are not in harmony with the New York cases.

SAVAGE, Ch. J., in *Allen v. Crofoot*, 5 Wend. 509, does not admire the distinction taken by Coke between the abuse of a license granted by law, and a license granted by the party. And he thinks a better reason was given for it in Bacon's Abridgment, title Trespass B. Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interfere to make void everything done by such abuse; because it was a man's folly to trust another with an authority who was not fit to be trusted therewith.

No case has been cited showing that a man will forfeit a license granted by law, by the use of vituperative language; and none such have fallen under my notice. In all the cases, except *Adams v. Adams*, and *Bond v. Wilder*, some positive act, such as if done without authority would be a trespass, has been held essential to make the party a trespasser *ab initio*. These cases may have been decided upon local statutes.

It is quite clear that the uttering abusive language was not an act for which the plaintiff could maintain trespass against the defendant. Had such language been uttered in an inn by a guest to the landlord, it would have afforded just cause for the latter to expel the former.

So doubtless in the *Six Carpenters' Case*, their refusal to pay for their room, though it did not make their original entry unlawful, would have justified the landlord in ordering them to depart. Story on Bail, 484.

The right of an innkeeper to refuse to receive a guest, or to order him to depart, rests on reasons peculiar to that relation. Id. 484. An innkeeper is bound to receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. 3 Barr. & Ald. 283.

"A highway," says SWIFT, Justice, in *Peck v. Smith*, 1 Conn. Rep. 132, "is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it." In this state, since the adoption of the revised statutes, the public, under certain circumstances, may have a qualified right of pasturage, by certain animals, at certain seasons. *Griffin v. Martin*, 7 Barb. 297. The use of the highway, by any person for any purpose other than to pass and repass, is a trespass upon the person who owns the fee of the road. 1 New Hamp. Rep. 16; *Babcock v. Lamb*, 1 Cowen, 238; *Jackson v. Hathaway*, 15 John. 447. But no act will amount to a trespass unless the same act would be a trespass if committed on any other land of the plaintiff. Language, however licentious and abusive, is not a trespass, within the appropriate meaning of that term. Nor can a party be made a trespasser upon the freehold of the adjoining owners of the soil, by the uttering of abusive language as he passes along the road. A person who disturbs the public peace as he passes along the road, by singing obscene songs and using boisterous and obscene language, may be liable to be punished at the suit of the public, for a breach of the peace, but he is not liable in trespass at the suit of the adjoining owners. These acts, however censurable, are not acts of trespass.

The foregoing remarks show that if the action was sought to be maintained on the ground that the defendant became, while passing on the road, a trespasser from the beginning, by reason of his abusive language to the plaintiff, the action cannot be maintained. The county judge must have taken this view of the case: for one of the reasons for the reversal is that evidence was received by the justice, under objections, of the language and conversation of the defendant on the sidewalks of public streets, and in his judgment no action could be maintained for that cause. It is presumed that the county judge supposed that the abusive language was proved, not as a substantive cause of action, but as showing that the defendant had forfeited his right to be in

the highway on the plaintiff's premises: in short that he was a trespasser *ab initio*, by reason of his abusive conduct.

* * * * *

*Judgment reversed.*¹

TRESPASS BY ANIMALS.

VAN LEUVEN V. LYKE.

(1 New York, 515.—1848.)

ACTION of trespass. Plaintiff recovered judgment, which was affirmed *on certiorari* by the court of common pleas, but reversed by the supreme court on error. (4 Denio, 127.) Plaintiff brings error.

JEWETT, C. J. It is alleged in the plaintiff's declaration "that on the 27th day of November, 1844, at," etc., "the defendants were the owners of a certain sow and pigs, which sow and pigs, to-wit, on the day and year aforesaid, to-wit, at the place aforesaid, bit, damaged, and mutilated and mangled a certain cow and calf of the plaintiff, while the said cow was in the act of calving, so that said cow and calf both died, to the plaintiff's damage \$50;" to which the defendants pleaded the general issue. There was evidence given on the trial sufficient to warrant the jury in finding that the plaintiff's cow and calf were destroyed by the defendants' sow and pigs in the manner set forth in the declaration, upon the land of the plaintiff, where the sow and pigs were at the time of committing the said injury. But there is no allegation in the declaration, or evidence given on the trial, that swine possess natural propensities which lead them, instinctively, to attack or destroy animals in the condition of plaintiff's cow and calf. Nor is there any allegation or evidence that the defendants previously knew, or had notice, that their swine were accustomed to do such or similar mischief, or that the swine broke and entered the plaintiff's close, and there committed the mischief complained of.

It is a well-settled principle that, in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness, before he can be charged, because such animals

¹ The judgment of the county court was reversed on other grounds.

are not by nature fierce or dangerous, and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, without notice, on the ground that by nature such animals are fierce and dangerous. 9 Bac. Abr. tit. "Trespass," I-505,506; *Jenkins v. Turner*, 1 Ld. Raym. 109; *Mason v. Keeling*, Id. 606, 12 Mod. 332; *Rex v. Huggins*, 2 Ld. Raym. 1583, 1 Chit. Pl. (Ed. 1812) 69, 70; *Vrooman v. Lawyer*, 13 Johns. 339; *Hinckley v. Emerson*, 4 Cow. 351. But this rule does not apply where the mischief is done by such animals while committing a trespass upon the close of another.

The common law holds a man answerable, not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many such animals, such as horses, oxen, sheep, swine, and the like to rove, the owner is bound, at his peril, to confine them on his own land; and if they escape, and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregit*, though he had no notice in fact of such propensity. 3 Bl. Comm. 211; 1 Chit. Pl. 70. And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the inclosure of the former under such circumstances; and, in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff, and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking and entering the close in such action is the substantive allegation, and the rest is laid as matter of aggravation only.

This principle is recognized as sound by several adjudged cases. In the case of *Beckwith v. Shordike*, 4 Burrows, 2092, the action was trespass for entering the plaintiff's close with guns and dogs, and killing his deer. The evidence showed that the defendants entered with guns and dogs, into a close of the plaintiff adjoining to his paddock, and that their dog pulled down and killed one of the plaintiff's deer. It was held to be sufficient evidence to prove the defendants trespassers and they were held liable for the injury done by their dog, although it was not shown that they had any knowledge or notice of the propensity of the dog to do such or similar injury.

In *Angus v. Radin*, 5 N. J. Law, 815, the action was trespass for the

defendant's oxen breaking into the inclosure of the plaintiff, and there goring his cow, so as to kill her; and upon the ground that the defendant had neglected to confine his oxen on his own land, and that they were trespassing on the land of the plaintiff, he was held liable for the injury done, although it was not alleged or proved that he knew or had notice of the propensity of his oxen to commit such an injury. And so in *Dolph v. Ferris*, 7 Watts & S. 367, where the action was trespass before a justice of the peace, and there tried without any declaration having been filed. Therefore the court held that the case must be considered as if the case had been tried on the most favorable declaration for the plaintiff which the evidence would have warranted. The evidence was that the bull of the defendant, which was running at large, broke and entered into the inclosure of the plaintiff, where his horse was feeding on the grass growing therein, and gored him so that he died by reason thereof in a few days. The court held it to be clear from the evidence that the defendant might have been declared against for having broken and entered the close of the plaintiff, and the grass and herbage of the plaintiff, there lately growing, with his bull eaten up, trod down, and consumed, and might also have been charged in the same declaration with having killed or destroyed the plaintiff's horse or colt with his bull.

But in the case under consideration there is no allegation charging the defendants' swine with doing any act for which the law holds the defendants accountable to the plaintiff without alleging and proving a *scienter*. Had the plaintiff stated in his declaration such ground of liability, or had charged that the swine broke and entered his close, and there committed the mischief complained of, and sustained his declaration by evidence, I am of opinion that he would have been entitled to recover all the damages thus sustained; but, as he has not stated in his declaration either ground of liability, the defendants ought not to be deemed to have waived the objection by not making it specifically before the justice. I think the judgment should be affirmed.

Judgment affirmed.

ELLIS v. LOFTUS IRON Co.

(L. R. 10 Common Pleas, 10.—1874.)

APPEAL from the county court judge of Glamorganshire.

The case as stated on appeal was as follows:—

The action was brought to recover £50, for injuries to the plaintiff's mare caused by the defendants' negligence.

The plaintiff was the occupier of a farm in the parish of Llansarran,

and by arrangements between the plaintiff's landlord, the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the execution of certain works, and a plot was fenced in by the defendants by means of a wire fencing.

The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle to the knowledge of the defendants.

The defendants were possessed of an entire horse, used by them as a draught cart-horse, and on Sunday, the 18th of August, this horse was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. The mare grazed in the remaining portion of the field adjoining that portion occupied by the defendants. The defendants' horse had been turned out on former occasions on the same plot, and had always been watched. The horse of the defendants and one of the plaintiff's mares got close together on either side of the wire fence, and the horse by biting and kicking the mare through the fence committed the injury complained of, the damage being taken at £15.

It was proved that the defendants' horse did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no evidence that the horse was of a vicious temper, or had bitten or kicked any animal before; on the contrary, it was stated that the horse was as quiet a temper as you would ever wish a horse.

The plaintiff had warned the defendants to keep the horse away from his mares.

The judge, being of the opinion there was no trespass, and that the damage was too remote, held there was no case for the jury.

The question for the Court was, whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid, the horse being a stallion.

LORD COLERIDGE, C. J. The judgment of the county court judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt in the matter. It is clear that, in determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has, moreover, been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the de-

defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law. The only remaining question is, whether the damages were too remote? I cannot see that they were; they were the natural and direct consequence of the trespass committed. These considerations would dispose of the case, but apart from any technicalities of law, it seems to me that the merits are in the plaintiff's favor. It appears that a piece of land was railed off for the defendants' convenience, and the plaintiff being in the habit of keeping mares on the adjoining land previous to this accident, the defendants' stallion had always been watched. Therefore, without saying that there was any gross negligence or carelessness on defendants' part, I think there was some default on their part, without which the accident would not have happened. It is not necessary for me to discuss the authorities that have been cited at length. I will only say that *Lee v. Riley*, 18 C. B. (N. S.) 721, is a very strong authority for our present decision. For these reasons I am of opinion that our judgment should be for the plaintiff.

KEATING, J. I am of the same opinion. The County Court judge appears to have held that the facts as stated did not amount to evidence of an actionable wrong on the part of the defendants. There seems to me, however, to be abundant evidence that the defendants' horse committed a trespass for which the defendants are liable.

The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet protruded through the fence over the plaintiff's land, and that would in my opinion amount in law to a trespass. If evidence of negligence was necessary to constitute a trespass in this case, in my opinion there is abundant evidence of negligence on the defendants' part, and none on that of the plaintiff. The defendants erected the fence and turned the horse into the field for their own convenience; they had ample warning with respect to the danger, and in consequence of such warning they had the horse watched on previous occasions, but failed to do so on the occasion when the damage was caused.

BRETT, J. I must confess I did entertain some doubt on this matter. The questions are whether there was any evidence of a trespass on the plaintiff's land for which the defendants would be liable, and if there was then whether the damage is too remote. I had no doubt that if there was evidence of negligence, and as a result of such negligence an animal of the defendants passed wholly or in part on to the plaintiff's land such a circumstance would constitute a trespass; but

what I did doubt for some time was whether, where there was no negligence at all on the part of the defendants, the same consequence would follow.

Having looked into the authorities, it appears to me that the result of them is that, in the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass. Blackstone, 16th ed. vol. iii. c. 12, p. 211; Chitty, Pleading, 7th ed. vol. i. p. 98; and Comyns' Digest, title Trespass, C, are all authorities to this effect. If, however, it were necessary that there should be evidence of negligence, I cannot say I should go the length that my brother KEATING did, in saying that there was abundant evidence of negligence, though I think there was some evidence. That would be sufficient to support our judgment in any view of the law; but I put my judgment on the ground that by law there was a trespass in this case without evidence of negligence. That being so, the question remains whether the damages were too remote. The case of *Lee v. Riley* is a distinct authority to the contrary; and the American case of *Vandemburgh v. Truax*, 4 Denio, 464, quoted in the notes to *Vicars v. Wilcocks*, 2 Smith's L. C. p. 499, 6th ed., is to the same effect.

DENMAN, J. I rather agree with my brother BRETT as to the amount of evidence of negligence in this case. I am by no means clear that there was such evidence of negligence as, if it was necessary to prove negligence, would have properly entitled the plaintiff to a verdict. The County Court judge appears to have nonsuited the plaintiff on the ground that there was no trespass, and the damages were too remote. Now during the early part of the argument I thought it a very strong thing to say that whenever any part of an animal passed over or through a fence, inasmuch as the same act, if done by a man, might technically be a trespass, therefore there was a trespass on the part of the owner of the animal. But after hearing the authorities cited, and especially the case of *Lee v. Riley*, and the passages from Comyns' Digest and Chitty on Pleading, it appears to me that they undoubtedly bear out that view.

It seems hard, when two parties have adjoining lands with a fence between them, and a quarrel arises between the animals on either side of the fence, one party should be liable for the consequences, though not in reality guilty of default or neglect any more than the other, by reason of the application to the mere act of an animal of the technical rule *Cujus est solum ejus est usque ad cælum*. I must say, however, that I cannot see, upon the authorities, any escape from the conclusion that it must be so.

The only remaining point is whether the damages were too remote. As to that I agree with the rest of the Court that the case of *Lee v. Riley* is conclusive.

Judgment for the plaintiff.

WOOD v. SNIDER.

(187 New York, 28.—1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the county court, which affirmed a judgment of a justice's court dismissing the complaint.

The defendant and six other persons, as owners, were driving some cattle along a public highway. Without fault on the part of the drivers, the cattle escaped from the highway and crossed the lands of one B, a distance of ten or twelve rods, to and upon the lands of the plaintiff, doing considerable damage. The drivers immediately pursued and drove them off. B maintained no fence between his land and the highway, and there was no division fence between the land of B and of the plaintiff.

CHASE, J. In deciding whether the plaintiff is entitled to recover the damages done by the cattle as alleged it is necessary to consider the rules or principles which have long been established relating to the possession of real property by its owner.

Every person whose rights are unaffected by some statute, contract or prescription is entitled to the possession of his real property undisturbed and unmolested by others.

Every man's land is in the eye of the law inclosed and set apart from another's either by visible and material fences or by an ideal, invisible boundary, and in either case every entry or breach carries with it some damages for which compensation can be obtained by action. Waterman on Trespass, vol. 2, sec. 873.

By the common law it was as unlawful for the beasts of a neighbor to cross the invisible boundary line as it would be to overleap or throw down the most substantial wall. Cooley on Torts (3d ed.) 684.

At common law every person was bound at his peril to keep his cattle within his own possessions, and if he failed to do so he was liable for their trespasses upon the lands of another whether the lands trespassed upon were inclosed or not. Ingram on Animals, 258; Cooley on Torts, *supra*; 2 Am. & Eng. Encyc. of Law (2d ed.) 351; 2 Cyc. 392; Cowen's Treatise (4th ed.) sec. 536; *Bush v. Brainard*, 1 Cowen, 78 (see note);

Tonawanda R. R. Co. v. Munger, 5 Denio, 255; *Stafford v. Ingersol*, 3 Hill, 38; *Hardenburgh v. Lockwood*, 25 Barb. 9; *Angell v. Hill*, 45 N. Y. S. R. 83; *Wells v. Howell*, 19 John. 384; *Holladay v. Marsh*, 3 Wend. 142; *Phillips v. Covell*, 79 Hun, 210; *Clark v. Brown*, 18 Wend. 213; *Rusk v. Lowe*, 6 Mass. 90; *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564; *Buford v. Houtz*, 133 U. S. 320.

The rule was not founded on any arbitrary regulation of the common law, but was an incident to the right of property. It is part of that principle which allows every man the right to enjoy his property free from molestation or interference by others. It is simply the recognition of a natural right. It pertains to ownership. *Bileu v. Paisley*, 18 Oregon, 47.

There is an exception to the common-law rule stated in favor of a person lawfully driving domestic animals along a highway. If such person exercise due care in so doing, he is not liable for injuries which they do by escaping from his control upon the adjoining lands if they are pursued and promptly removed. *Rightmire v. Shepard*, 36 N. Y. S. R. 768.

It is sometimes necessary to drive cattle along public highways and such use of highways is lawful. As cattle will sometimes stray even if reasonable care is used in driving them, the possibility of damage by their inadvertent and casual straying upon the lands adjoining the highway, is one of the necessary consequences of the enjoyment of the right to use the highway. It must, therefore, have been contemplated when the highway was laid out and established. Such casual trespassing is an inevitable incident to the right to use the highway, and where the owner of lands adjoining a highway leaves the same wholly unfenced, he thereby adds to the possibility of such casual trespass. *Goodwyn v. Chevely*, 28 L. J. 298 (Eng.); 47 Justice of the Peace (Eng.) 513, Aug. 18, 1883; *Ingham on Animals*, 284.

The rules of the common law in regard to cattle trespassing upon the lands of others have been recognized, approved and adopted in this and many states of the Union. They are not adopted in some of the states of the Union for the reason that they were inapplicable to the nature and condition of the country at the time such rules were first considered by the courts of such states. The great value of the lands of such states for pasturage, and the scarcity of materials for fencing, were the principal reasons for their courts holding that the rules of the common law were inapplicable. *Buford v. Houtz*, 133 U. S. 320.

Fence laws have been adopted in this and other states which materially affect the question of the rights of parties where cattle trespass upon lands from other lands in which they are rightfully allowed to roam.

Where by statute or otherwise an obligation rests upon an owner of real property to fence the same, such obligation extends only in favor

of persons owning domestic animals which are rightfully on adjoining lands. It is a principle of the common law universally recognized where the common law prevails that owners of real property are not obliged to fence but against cattle which are rightfully on the adjoining lands. See cases and authorities cited above. The statutes of this state are drawn in recognition of this rule.

The Railroad Law (Laws of 1890, chap. 565, sec. 32, as amended by chap. 676 of the Laws of 1892) provides that every railroad corporation shall erect and maintain fences on the sides of its road of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road from the adjacent lands. And it further provides that no railroad need be fenced when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands.

The duty to fence their tracks imposed upon railroad companies by statute is the same imposed upon individuals by prescription, at common law or by statute, and requires them to fence their tracks only against domestic animals rightfully on the adjoining lands or rightfully on the highway. (12 Am. & Eng. Ency. of Law [2d ed.] 1084; see, also, vol. 16, 494; *Lee v. Brooklyn Heights R. R. Co.*, 97 App. Div. 111.)

The fence law of this state provides: "Each owner of two adjoining tracts of land, except when they otherwise agree, shall make and maintain a just and equitable portion of the division fence between such lands, unless one of such shall choose to let his lands lie open to the use of all animals which may be lawfully upon the other lands, and does not permit any animals lawfully upon his premises to go upon lands so lying open. . . ." (The Town Law [Laws of 1890, chap. 569], sec. 100, as amended by Laws of 1892, chap. 92.)

It further provides: "When the owner of any lands shall choose to let them lie open, he shall serve upon the owners of the adjoining lands a written notice to that effect, and thereafter the owners of such adjoining lands shall not be liable in any action or proceedings, for any damages done by animals lawfully upon their premises going upon the lands so lying open or upon any other lands of the owner thereof through such lands so lying open. . . ." (The Town Law, sec. 101.)

The exclusive right of possession incident to the ownership of real property extends to all owners including the owners of real property adjoining a highway. Because it is necessary at times to drive cattle along a highway, and they cannot be so driven without exposing the owners of real property adjoining the highway to an inevitable risk, such risk, as we have seen, is incident to the use of the highway and a burden upon such adjoining lands.

The exception to the common-law rule that prevents the owner of lands adjoining a highway from recovering damages for an inadvertent trespass of cattle from such highway, is only applicable in favor of

owners of cattle lawfully upon the highway, and the reason for the exception to the rule does not apply where the cattle trespassing upon adjoining lands, were unlawfully in the highway, neither does it extend to trespasses upon lands other than those adjoining the highway.

Cattle coming upon lands of an adjoining owner from a highway can be driven from such lands by the owner, and it is the duty of the owner of the cattle to remove them with all reasonable speed.

A recovery for an inadvertent trespass by cattle lawfully on the highway is not denied, because the cattle are lawfully upon the lands adjoining the highway, but the exception to the rule is, as we have also seen, an arbitrary and artificial one arising from necessity or an effort to relieve persons engaged in a lawful traffic on a public highway from too heavy a burden, and goes only to the extent of depriving such owner of lands adjoining the highway of a remedy by action for such trespasses. The cattle are not lawfully upon such adjoining lands, and if they trespass upon lands of another after crossing the lands so adjoining the highway, they do so from a place where they had no right to roam; and as an owner of lands, even where division fences are required by statute or prescription, is not required to fence against cattle not rightfully upon the adjoining lands, the plaintiff is not deprived of his remedy for the trespass of the defendant's cattle. The exception to the rule relating to the remedy for trespasses by cattle has never been extended, so far as we are aware, to prevent the recovery for a trespass by cattle wrongfully on a highway, or wrongfully on lands adjoining those upon which damages are claimed for trespass. The plaintiff in this case, by leaving his lands unfenced, did not take the chances without the right of recovery for trespasses by cattle wrongfully upon the lands adjoining the highway and between the highway and his lands. The limitation on the exception to the rule of the common law relating to trespass upon real property has been stated by the courts so far as appears from the reports whenever the question has been squarely presented.

In 1604, in the case of *Harvy v. Gulson* (Hil. 1 Jac. C. B.), reported by William Noy (Eng.), in 1669, and found at page 107 of his volume of reports, the Hilary Term James I Common Pleas Court said: "That if A hath a Close next to the Highway and beasts come out of the Highway into the Close of A, and there—hence they enter into another Close of B adjoining and that B ought to fence, There in default of enclosure, etc., it is a good plea against A, but not against B or another stranger etc." VE: 36, H. 6 Barr, 168.

In *Lord v. Wormwood* (29 Maine, 282), cattle were lawfully in the highway, they being permitted to go at large and feed there, by vote of the town; and being thus upon it, and having passed therefrom into the unfenced land of an adjoining proprietor, it was held that, although

he might not be able to maintain any action, they were wrongfully upon such land, and having passed therefrom to and upon the plaintiff's unfenced lot not bordering upon the highway, he might maintain trespass, for he was under no obligation to fence as against them.

In *McDonnell v. Pittsfield & North Adams R. R. Corporation* (115 Mass. 564) the defendant was sued for the value of two colts run over and killed by one of its engines. The colts were on the highway in the care of the plaintiff's son, and escaped upon the lands of one Wells adjoining the highway, and from the lands of Wells entered upon the defendant's right of way and were there killed. The court say:

"The principle of the common law, which requires that each should keep his cattle on his own land, is so far modified as to hold the owner not liable for the trespass of his cattle, which, passing along the highway and being properly managed therein, casually wander into the unfenced lots bounding thereon, provided he removes them with reasonable promptness. But the cattle are not in such case lawfully upon such lots. They are there only under such circumstances that their trespass, being casual, and such as could not have been prevented by reasonable care, is held excusable, and this is all. That they should be rightfully and lawfully upon land, the authority or consent of the owner of the close is necessary, and even if he is without a remedy for the injury they may cause him, the owner of the cattle does not acquire his rights as against the owners of adjoining closes. If, after entering upon his close, they proceed into another adjoining thereto, they are there trespassers, and an action may be maintained for such trespass, by the owners of the second close, even if his fence was insufficient, and if he was also bound to fence as against the owner of the first close. Being thus bound he is only bound to fence against cattle rightfully on the first close. *Rust v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Mass. 33."

It thus appears both upon principle and from precedent that the owners of the cattle were liable to the plaintiff for any damage which he has sustained.

From the record it could be found that the cattle were all upon the plaintiff's land and that they did equal damage to him, if so the defendant was liable for such part of the damage done by all the cattle, as the number of cattle owned by him bears to the whole number of cattle trespassing upon the plaintiff's land. *Partenheimer v. Van Order*, 20 Barb. 479.

The judgment in each court should be reversed, with costs in all the courts.

CULLEN, CH. J., EDWARD T. BARTLETT, WERNER and WILLARD BARTLETT, JJ., concur. GRAY, J., absent. HISCOCK, J., not sitting.

Judgment reversed.

TRESPASS DE BONIS ASPORTATIS.

HAYTHORN V. RUSHFORTH.

(19 New Jersey Law, 160.—1842.)

THIS was an action of replevin brought in the Circuit Court of the county of Hudson, to recover certain machinery for the manufacturing of woolen goods.

The defendants pleaded *non cepit*, and property in themselves. The cause was tried at the last December term of that court, a verdict rendered for the plaintiff on both issues, and his damages assessed at three hundred dollars.

After the plaintiff had rested, the defendants' counsel moved for a nonsuit, upon the ground that there was not sufficient evidence of a wrongful taking to sustain the action. The motion was overruled, with permission however to the defendants to obtain the advisory opinion of this court upon the question. Whereupon the case was certified, according to the statute.

WHITEHEAD, J. The case shows the following state of facts: The plaintiff and one John Buckley were originally the joint owners of the machinery in question; and on the dissolution of the co-partnership between them in October, 1836, the plaintiff sold and assigned all his right and interest therein to Buckley, who thereby became the sole owner thereof. In the spring of 1837, Buckley rented a building of the defendants in the township of Lodi, in the then county of Bergen, and removed the machinery into it. He was engaged for some time in manufacturing goods for the defendants at a given sum per yard, they finding the stock, and he furnishing the labor and machinery. The defendants soon after this arrangement became insolvent, and failing to fulfil their part of the contract in furnishing the materials, the parties made another arrangement, by which "the defendants were to work the machinery, part of the time towards the rent of the building, and Buckley to do any country work that might offer." He stopped manufacturing in the summer of 1837, but retained the key of the building and had the control of the machinery until November or December of that year, and until the same was demanded by the plaintiff as hereinafter mentioned.

On the 4th of November, 1837, Buckley being indebted to the plaintiff, executed to him a bill of sale of the machinery, at which time, he says, he considered himself in the possession of it. One or two weeks after this, the plaintiff went to the factory of the defendants in company

with Buckley, and demanded the machinery of Rushforth. The plaintiff said, "I have come after the machinery," and exhibited to him the bill of sale. Rushforth refused to deliver it, saying, it should not go out of the factory until they got others in the place of it. Buckley was present and consented that the plaintiff should take it.

Under this state of facts, the defendants insisted, that the goods had not been tortiously taken, and consequently that replevin would not lie. Whether tortiously taken or not, depends in some measure upon the possession of the goods by Buckley at the time of the execution of the bill of sale.

It is manifest from the evidence, that Buckley, at the time of the execution of the bill of sale to the plaintiff, was the absolute owner of the machinery; and if not in the actual possession thereof, he was so constructively. He considered himself in the possession of it. It was in a building he had rented of the defendants, the key of which he retained. By the last arrangement between the parties, after the defendants had failed in the business, the defendants were only permitted to use the machinery when Buckley had no use for it. There was nothing in this arrangement which gave to the defendants any right or power over it, affecting Buckley's right to use, sell or deliver it. When the plaintiff exhibited his bill of sale, and demanded the machinery, the defendants did not question his right of property, nor did they assert any right to the possession. They refused to suffer it to be removed, until its place was supplied by other machinery, thereby placing their refusal, not upon a claim of right, but upon the ground of inconvenience to themselves.

Under this evidence, it appears to me, Buckley must be considered, at the time of the execution of the bill of sale, as having, beyond all question, the constructive possession of the machinery; and by the bill of sale, the plaintiff succeeded to all his rights, both of property and possession.

Now it has been repeatedly ruled, that a general property in goods, with the constructive possession thereof, that is to say, a right to reduce them to possession at pleasure, is sufficient to maintain either trespass or replevin.

The case of *Dunham v. Wyckoff*, 3 Wend. 280, came before the court upon a demurrer to the avowry of the defendant, in which he avowed the taking of the goods in question, as sheriff, by virtue of a writ of execution against one Griswold, as the goods and chattels of Griswold, the same being in the possession of Griswold. The pleadings admitted that at the time of the taking, the property was in the plaintiff, and the possession in Griswold, the defendant in execution. The question was, whether replevin would lie. The court say, "replevin lies where trespass *de bonis asportatis* will lie. The plaintiff must have property general

or special, and possession either actual or constructive. The plaintiff having the property in the goods in question, had the constructive possession; for the property draws to it the possession. The plaintiff therefore had the right to take possession at pleasure, and could have sustained trespass: and replevin and trespass in such cases are concurrent remedies."

The plaintiff then being the absolute owner, and in the constructive possession of the machinery; did the conduct of the defendants, at the time the demand was made, amount in law to a tortious taking thereof or was it such an interference with the property as would entitle the plaintiff to maintain an action of trespass against them?

The evidence is, that when the plaintiff exhibited his bill of sale and demanded the machinery, the defendant Rushforth *refused to deliver it, saying, it should not go out of the factory until they got others in the place of it*. Here was an unlawful intermeddling with the property; an exercise, or claim of dominion over it, without any pretence of authority or right. This without a manual seizing of the property is sufficient in law, to constitute a tortious taking; 7 Cowen Rep. 735; 10 Wend. R. 349; 23 Wend. R. 462; 15 Wend. R. 631; and consequently renders them liable to an action of trespass or replevin.

It is not necessary to the decision of the question in this cause, to express an opinion upon another point raised by the plaintiff's counsel, whether the action of replevin in this state may not be sustained for a wrongful detention, when the taking was not tortious.

The Supreme Court of Massachusetts held, that the action lies for goods unlawfully detained though there was no tortious taking. 15 Mass. Rep. 284; 16 Mass. Rep. 147. In the last case, PUTMAN, Judge, is of opinion, that one may be constructively taking goods, who came lawfully into possession, but keeps them from the owner against right. CHIEF JUSTICE SAVAGE, in reference to these decisions, remarks in *Marshall v. Davis*, 1 Wend. 109, "were the question new in this court, I should be strongly inclined to hold the doctrine of the Massachusetts Court correct."

There is a strong disposition in courts to favor this action, as it furnishes a more adequate remedy than trespass or trover; and not unfrequently it is the only effectual remedy for the party injured. In the language of the late CHIEF JUSTICE EWING, 6 Halst. 374, "The remedy by replevin is prompt, efficacious and beneficial, and the use of it on proper occasions should be rather fostered than repressed."

ELMER, J., delivered a concurring opinion.

The Circuit Court advised to give judgment for the plaintiff.

HOBART V. HAGGET.

(12 Maine, 67.—1835.)

TRESPASS for taking and converting an ox. Plaintiff sold defendant an ox, and told him to go to his place and take it. Defendant took one out of plaintiff's field which he supposed was the one he purchased. Plaintiff testified that the ox taken was not the one he intended to sell.

The court instructed the jury, that, if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question, when in fact, plaintiff supposed he was not selling that ox, but another, they would find for the plaintiff. Verdict for plaintiff. Defendant excepted.

PARRIS, J. The ox taken by defendant was the property of the plaintiff, and although the defendant attempted to prove that he purchased *that* ox, and consequently had a right to take it, the attempt wholly failed. He may have considered himself as the purchaser, but, unless the plaintiff assented to it, no property passed. The assent of both minds was necessary to make the contract. The court below charged the jury that if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question when in fact the plaintiff supposed he was not selling that ox, but another, that they would find for the plaintiff. The jury, having found for the plaintiff, have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that, where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position.

But the act complained of in this case was not involuntary. The taking the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A he takes by mistake the property of B, intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers. The case of *Higginson v. York*, 5 Mass. 341, was still stronger than either of those above supposed. In that case, one Kenniston hired the defendant to take a cargo of wood from Burntcoat island to Boston.

Kenniston went with the defendant to the island, where the latter took the wood on board his vessel, and transported it to Boston, and

accounted for it to Kenniston. It turned out on trial that one Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by Phinney. A mistake will not excuse a trespass. Though the injury has proceeded from mistake, the action lies, for there is some fault from the neglect and want of proper care, and it must have been done voluntarily. *Basely v. Clarkson*, 3 Lev. 37. Nor is the intent or design of the wrongdoer the criterion as to the form of remedy, for there are many cases in the books where, the injury being direct and immediate, trespass has been holden to lie, though the injury were not intentional, as in *Guille v. Swan*, 19 Johns. 381, where the defendant ascended in a balloon, which descended into the plaintiff's garden; and the defendant, being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, the defendant was held answerable in trespass for all the damages done to the garden. In this case SPENCER, C. J., said: "The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong." See, also, 1 Poth. art. 1, § 1; 1 Sum. 219, 307.

* * * * *

The exceptions are overruled, and there must be

Judgment on the verdict.

DEXTER V. COLE.

(6 Wisconsin, 319.—1857.)

THE plaintiff declared in trespass, charging the defendant with taking and driving away twenty-two sheep, the property of the plaintiff, to his damage one hundred dollars. Plea, general issue. The cause was tried before a justice of the peace and a jury, and it appeared from the evidence that the defendant, a butcher at Milwaukee, was driving some sheep he had purchased toward the city, upon the highway, when they became mixed with a small lot of twenty-two sheep belonging to plaintiff, which were running at large upon the highway. The defendant then drove the whole flock into a yard near the road, for the purpose of parting them, and threw out a number which he did not claim, and pursued his way with the remainder to his slaughter-house at Milwaukee, where

they were killed. The evidence tended to show, and the jury found it did show, by the verdict rendered, that some four of plaintiff's sheep remained in the flock, were driven to Milwaukee, and there slaughtered by the defendant. Verdict for plaintiff.

The cause was removed to the county court by a writ of *certiorari*, the defendant alleging the following errors:

1. That from all the testimony in the case, it does not appear that the defendant ought to be charged as a trespasser.

2. That there is no testimony that the defendant ever took and converted the sheep to his own use.

3. That from the testimony it appears that the action should have been trover, and not trespass, there being no proof of the unlawful taking.

4. The testimony is uncertain and insufficient to found a verdict upon in any form of action.

5. The verdict is against the evidence.

The county court reversed the judgment, and the plaintiff brought this writ of error.

By the Court, COLE, J. We have no doubt but the action of trespass would lie in this case. In driving off the sheep, the defendant in error without doubt unlawfully interfered with the property of Dexter; and it has been frequently decided, that to maintain trespass *de bonis asportatis*, it was not necessary to prove actual forcible dispossession of property; but that evidence of any unlawful interference with, or exercise of acts of ownership over, property, to the exclusion of the owner would sustain the action. *Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Met. 27; *Phillips and Brown v. Hall et al.*, 8 Wend. 610; *Morgan v. Varick*, id. 587; *Wintringhouse v. La Foy*, 7 Cowen, 735; *Reynolds v. Shuler*, 5 id. 325; 1 Chitty Pl., 11th Amer. ed., 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent; it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally, or by mistake. 2 Green. Ev., section 622; *Grulle v. Snow*, 19 J. R. 381. There is nothing inconsistent with these authorities in the case of *Parker v. Walrod*, 13 Wend. 296, cited upon the brief of the counsel for the defendant in error.

Upon the other point in the case, we think there was some evidence to support the verdict of the jury, and therefore the judgment of the justice should not be reversed because the proof was insufficient. It was the province of the jury to weigh the evidence and determine what facts were established by it, and the county court ought not to reverse the judgment, because the proof was not sufficient in its opinion to justify the finding of the jury.

The judgment of the county court is therefore reversed and the judgment of the justice affirmed.

CONVERSION.¹

WHAT CONSTITUTES.

BURROUGHS V. BAYNE.

(5 Hurlstone & Norman, 296.—1860.)

TROVER for a billiard table with the appurtenances.

Pleas: first, not guilty; secondly, that the goods were not the plaintiff's. Whereupon issued was joined.

At the trial before BRAMWELL, B., at the sittings in London after Trinity term, it appeared that, in July, 1857, the billiard table in question had been hired of the plaintiff by one Filmer, who kept a hotel in Harley Street, Cavendish Square. . . .

The table remained in Filmer's possession, till the 7th of March, 1859, when a further agreement was drawn up, endorsed on the first agreement, and executed by Filmer. . . .

This agreement was never completed. . . . At the beginning of April the plaintiff demanded the billiard table of Filmer, when he found that a bill of sale had been executed by Filmer to the defendant, under which the defendant's man was in possession of the goods in Filmer's house. The billiard table was included in the bill of sale. On the 13th of April a clerk of plaintiff's attorney served on the defendant, at his house in Brook Street, a formal demand of the billiard table. The defendant asked to see the agreement, which the plaintiff's son accordingly produced to him on the next day. The defendant then asked for a copy, that he might consult his attorney, but the plaintiff would not

¹ "There are two principal differences between the actions of trespass and trover [technically called conversion, and developed, to a large extent, through the common-law action on the case of trover] for personalty appropriated by defendant; the first of which is, that in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct, while in trover, the original taking is supposed or assumed to be lawful, and often the only wrong consists in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. The second is, that trespass lies for any wrongful force, but the wrongful force is no conversion where it is employed in recognition of the owner's right, and with no purpose to deprive him of his right, temporarily or permanently." Cooley on Torts, 2d ed., 517.

allow a copy to be taken. The plaintiff's son deposed that the defendant seemed at first willing to give up the table; but afterwards, on reading the two agreements, said, "If it was a hiring only, he would give up the table, but it appeared to be a purchase. The table was in the inventory, and, unless the plaintiff could prove that it was his, he would stick to it." The plaintiff then caused notices to be served on the defendant and the man in possession, that on the following morning, the 15th of April, at twelve o'clock, he would call to fetch away the table. The plaintiff and his men called on the next day at Filmer's house in Harley Street at the time appointed and saw the man in possession, but could not obtain the billiard table, the door of the billiard-room being locked. The plaintiff never got the billiard table, which was ultimately seized and sold by the landlord under a distress for rent. The defendant swore that on the morning of the day last mentioned he had given instructions to the man in possession not to detain the table. The man in possession said that he told the plaintiff that he might have the table, but he could not find the key of the room in which it was. The jury found a verdict for the plaintiff.

In Michaelmas term a rule was obtained for a new trial, on the ground that there was no evidence of a conversion, and that the verdict was against the evidence.

MARTIN, B. The question in this case was, whether there was evidence to go to the jury of a conversion; and we are all of opinion that there was. The case, as it seems to me, is of considerable importance. There is no more common cause of action than where an owner of goods complains that another has wrongfully taken possession of them. The law has provided four forms of action applicable to such a state of things. First, the action of trespass, which appears more immediately directed to the taking of a man's property out of the possession of the owner; secondly, the action of replevin in respect of goods taken but restored to the owner by process of law. But at common law the more direct remedy for the recovery of possession, or damages, where a chattel was detained from the owner, was the action of detinue. There existed, however, an objection to that action, which was that the defendant was entitled to wage his law; and the consequence was that the defendant in an action of detinue, by himself swearing to the non-existence of the cause of action, could at once defeat the plaintiff. In consequence of this, the courts of law in very early times invented the action of trover. They permitted the plaintiff to state that he lost goods which he never lost, and that the defendant found goods which he never found, and that the defendant converted the goods so found to his own use. The courts took upon themselves to prohibit the defendant from denying either the averment of the losing or the finding by the defendant; and thus they

gave an action (a species of action on the case) in which the defendant could not wage his law. That, I believe, was the origin of the action of trover,—an action devised for the purpose of preventing the plaintiffs from being defeated by the wager of law. The origin of the action of *indebitatus assumpsit* was the same. For the purpose of preventing the wager of law in an action to recover a debt, the courts devised the action of *indebitatus assumpsit*, wherein it was alleged that the defendant was indebted to the plaintiff, and, being so indebted, he promised to pay the debt, but broke his promise. This was an action on the case, and wager of law could not be made. This, I believe, was the true origin of the action of trover, and, in my judgment, we ought to extend its operation to all cases where a right of action in detinue properly exists, and not throw difficulties in the way of a man's recovering where his goods are wrongfully detained. I myself have always understood that trover was the action whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention. I do not think there is any necessity to discuss the original meaning of the words "trover" or "conversion," they are technical expressions used in an action given by the law to enable a man to recover damages for the unlawful detention of his property. I freely admit that the word "conversion" is an unfortunate expression. Undoubtedly, in the great majority of cases where an action of trover is brought, no conversion in one sense has taken place; the goods are in the same state in which they always were; there is no actual conversion in the sense in which a person, not a lawyer, might possibly understand the term. In ordinary cases, the plaintiff's proof is much the same as would be required in an action of detinue. But the word "conversion," by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them. In *Wilbraham v. Snow*, 2 Wms. Saund. 47g, there is a note of Serjeant Williams, which, I apprehend, is as good an authority on this subject as exists. He says: "So where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done, under a pretended usage to do so, a demand and refusal being proved, it was held, by Holt, C. J., that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon one's self the property in and right of disposing of another's goods? And whoever detains another man's goods from him without cause takes upon himself the right of disposing of them." Now I adopt that as the true meaning of the word "conversion," in reference to this action, and the same rule has been laid down in modern times. There is a case, *Fouldes v. Willoughby*, which I have long con-

sidered, and often heard cited as laying down the true rule upon this subject. In that case a ferryman at Birkenhead had had some horses put on board his boat to bring to Liverpool; he turned them out, and the horses were left upon the road. An action of trover was brought, and the question was, whether or not trover lay for their value. The court were of opinion that it did not; and the distinction between the action of trespass and trover was much discussed. ALDERSON, B., in delivering his judgment, says: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." I entirely accede to this view of the law, which is simple and of easy application.

Apply it to this case. The facts were these: A person had hired a billiard table of the plaintiff, and then had executed a bill of sale to the defendant; and I own that I am not prepared to state that the taking possession under that bill of sale was not an act of conversion, for it seems to me it falls within what is stated by ALDERSON, B., that it is an act by which the defendant took possession of the chattel for the use of himself from a person who had no right to give it. I am by no means inclined to say that the simple taking possession by the defendant under the bill of sale was not a conversion of those goods. What further took place, however, is this: The plaintiff went to the defendant and showed him the document under which the billiard table was hired. Thereupon the defendant said he would give it up; but, on turning over the paper, he found something which was an incomplete contract for sale, and he then alleged that there was a sale, or that he supposed there was, and refused to give it up. He said, in effect, "You are not entitled to it," and he did not deliver it up. In the evening the plaintiff told the defendant that at twelve o'clock on the following day he should send for the table for the purpose of carrying it away. Accordingly the plaintiff did send, and could not get it, it being locked up. In the meantime the defendant had found that he was in error, and had directed the man in possession to give up the billiard table. If the key could have been obtained, it is suggested that it would have been given up. The plaintiff, however, went to get the billiard table in pursuance of his notice; and I think it was the duty of the defendant to be ready to give it to him when he came for it. The consequence was that the billiard table was distrained by the landlord for rent. If it had been delivered up to the plaintiff on the day appointed, when he was entitled to have it, this would not have happened. I think that this was evidence to go to the jury of a conversion. I myself should have directed

the jury to find a verdict for the plaintiff, if they believed the evidence adduced on his behalf. For these reasons, I think the rule ought to be discharged.

BRAMWELL, B. I think, if anything was necessary to show the impolicy of this form of action, and of using words in any other than their primary signification, it would be the difference of opinion which has arisen as to the meaning of the term "conversion." It seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be a difficulty. As to this particular case, I think there was no misdirection; certainly, in a technical sense, there was not; because, if the plaintiff's account is true, there was evidence of a conversion,—he demanded the goods, and could not get them. But, I think, if the jury acted upon that, they acted upon erroneous evidence, and that they ought to have acted on the evidence of the defendant; and, therefore, if my learned brothers had taken the same view of the evidence as I do, I should have thought a new trial ought to have been granted. But I protest against the notion that, because the judge who tried the cause says he is dissatisfied with the verdict, therefore a new trial should be granted. That ought not to be unless there are reasonable grounds for that dissatisfaction. Inasmuch as I have not been able to persuade my brothers that my grounds are reasonable, I think that they are right in discharging the rule. But I confess I think the verdict was against the evidence. I cannot say there was not evidence to go to the jury of a conversion of the goods, but I think the verdict was against the evidence. It certainly is not every detention of goods (although there is no right to detain them) that is a conversion, in my judgment at all events. PARKE, B., in *Clark v. Chamberlin*, 2 M. & W. 78, said: "If, instead of insisting upon salvage being paid, the defendant had said, 'I do not know whether salvage is due or not; I shall keep them until that is ascertained,' he would not have been guilty of a conversion." In such cases it would be monstrous to hold that a man had not a right to make reasonable inquiries. It cannot be that, if I pick up a watch in the street, and another person says, "that is mine," I am bound at once to deliver it up. I may say, "It may be, but I will not give it to you before you tell me the name of the maker;" and, if he thereupon walked away, it cannot be that he would have a right of action against me simply because I exercised a sound discretion. If such were the law, I should be sorry for it; but I do not believe it is. The result is, you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. I confess that there are some

cases of a simple wrongful withholding, which may, according to the construction put upon that word, be called a conversion to a man's own use; because, what matters it, to one who may be the owner of the goods, how or why he is deprived of them? If a person detains a sheep belonging to me, what matters it to me whether he does so because he means to eat it, and does eventually eat it, or makes any other use of it. He has claimed a dominion over it inconsistent with mine. Suppose a man detains a picture for the pleasure of looking at it, and in order that it may form one of the ornaments of his dining-room, and does nothing to it but let it hang there: that is, to all intents and purposes, a conversion, according to law and good sense.

Now, in the present case, the defendant got possession of the billiard table, not wrongfully, because it was let on hire to a person who had lawful possession of it, and who might hand it over to the defendant without the defendant being a trespasser or wrongdoer therein. There was no suggestion that he got possession of it wrongfully; but, having got possession of it lawfully, and never having removed it from the place where it was originally placed, and, in truth, having nothing more than what might be called nominal possession of it, the plaintiff comes and says, "The billiard table is mine, give it to me." The defendant says, "Show me how it is yours; bring the contract of hiring." The contract of hiring is brought; the defendant sees a writing on the back of it, which tends to show it was a sale; and then asks for a copy, in order that he may take advice upon it; the plaintiff, instead of doing as he properly might have done according to my view, says: "I shall not; the table is mine; you may give it to me or not; but I shall treat it as a refusal." It turns out that he himself put the true color on the transaction, by sending a formal notice, and going the next morning for the billiard table, not treating it as an absolute refusal, but saying, "I will come and take it away with the proper means for doing so." The next morning, when he did come, it unfortunately happened that the defendant had given up the nominal possession; and the person who had the actual custody had locked up the room, and the plaintiff could not get the table; he went away, and five or six days afterwards the table was distrained for rent. It seems to me the more reasonable view of the case that this was not a conversion of the table to the defendant's own use. An attempt was made by my Brother MARTIN to render this word "conversion" intelligible. But it ought to be borne in mind that in the forms of pleading given in the appendix to the Common-law Procedure Act of 1852 (the 15 & 16 Vict. c. 76), this is the form of the count in trover: "That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say," etc. So that the Legislature has put a meaning on the word "conversion." If the complaint had been that

the defendant wrongfully deprived the plaintiff of the use and possession of his goods, the answer might well be, "I did not continue to detain them; you might have had them, but you would not wait. If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing." Instead of which, by the use of the word "conversion," the defendant is made liable for the value of the billiard table, which he cannot recover from anybody else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff; that the whole affair was matter of discussion up to the time when the plaintiff was informed the goods were at his service; and that, so far as the defendant was concerned, there clearly was no conversion. For these reasons I think that the verdict was against the evidence; but, in so saying, I desire to add that in my opinion, it is not merely because the judge who tried the cause comes to a different conclusion from the jury upon the facts, that a new trial should be granted; but that where it appears to the court that the view taken by the judge is wrong he should be set right, as on the present occasion, by being overruled.

*Rule discharged.*¹

FARRAR V. ROLLINS.

(37 Vermont, 295.—1864.)

TROVER for a sled. Plea, the general issue. Verdict for the plaintiff.

POLAND, CH. J. It is fairly to be inferred from the exceptions that the plaintiff's sled was in the defendant's possession at the time the plaintiff requested the defendant to return it.

The plaintiff did not claim that the defendant obtained possession of it wrongfully, but that he loaned it to him, or to his servant, Cole, so that there was no conversion by a wrongful taking. But the plaintiff claims that it was unlawfully detained and withheld from him by the defendant when he called for or demanded it.

The plaintiff requested the defendant to return the sled to his (the plaintiff's) house, where he got it. This the defendant refused to do, on the ground that when Cole borrowed the sled he borrowed it for himself, and not for the defendant. The defendant made no claim to the sled, and no objection to the plaintiff's taking it; he only refused

¹ Opinion by CHANNELL, B., omitted.

to carry it to the plaintiff's house, claiming he was under no obligation to do so. If the borrowing was really on behalf of the defendant, so that it was his duty to have returned it to the plaintiff, his refusal to do so was no conversion; it was a mere breach of contract, for which he might be liable in a proper action.

The principle is undoubted that where one has the property of another in his possession, with no right to retain it, and being called on to surrender it to the owner, refuses, he is guilty of conversion, and trover will lie. But here was no refusal to surrender the sled to the plaintiff, and no withholding it from him; indeed, the plaintiff did not ask to have it delivered to him. He claimed that the defendant should carry the sled to his house, which the defendant refused. If this refusal was wrongful, it was no conversion. There was no repudiation of the plaintiff's right to the sled, and no assertion or exercise of any dominion over it by the defendant inconsistent with the plaintiff's right. The plaintiff could have his sled when he called for it, but insisted the defendant should fulfill his duty, or perform his contract by carrying it home.

Judgment reversed and case remanded.

SPoonER v. MANCHESTER.

(133 Massachusetts, 270.—1882.)

THE declaration stated that "The defendant hired the plaintiff's horse and carriage to drive from Worcester to Clinton and back in a prudent, careful and proper manner, and that the defendant drove the same beyond Clinton to Northborough wrongfully, and managed and drove said horse so improperly, unskillfully and wrongfully, while at said Northborough, that said horse's ankle was broken and otherwise injured, to the great damage of the plaintiff." Answer, a general denial.

To the finding in favor of the plaintiff, the defendant alleged exceptions.

FIELD, J. This case apparently falls within the decision in *Hall v. Corcoran*, 107 Mass. 251, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when, after travelling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and, although the declaration is not strictly in the proper form

for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when, as in this case, the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney*, 117 Mass. 102.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him, by relation, as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes*, 102 Mass. 503, MR. JUSTICE GRAY says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed

the property," and the authorities are there cited. *Fouldes v. Willoughby*, 8 M. & W. 540, is a leading case, establishing the necessity, in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons v. Lillystone*, 8 Exch. 431; *Wilson v. McLaughlin*, 107 Mass. 587.

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Lucas v. Trumbull*, 15 Gray, 306; *Hall v. Corcoran*, *ubi supra*. In each of these cases, there was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington v. Wentworth*, 8 Met. 548, a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season, with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. CHIEF JUSTICE SHAW says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

Parker v. Lombard, 100 Mass. 405, and *Loring v. Mulcahy*, 3 Allen, 575, were both decided upon the ground that the defendant neither assumed to dispose of the property as his own, nor intended to withhold the property from the plaintiff.

Nelson v. Whetmore, 1 Rich. 318, was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore v. Newton*, 9 Allen, 171, the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies

an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Fouldes v. Willoughby*, *ubi supra*; *Wilson v. McLaughlin*, *ubi supra*; *Nelson v. Merriam*, 4 Pick. 249; *Houghton v. Butler*, 4 T. R. 364; *Heald v. Carey*, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant on his return to Worcester, a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.

Exceptions sustained.

FROME v. DENNIS.

(45 New Jersey Law, 515.—1883.)

DIXON, J. In August, 1879, the plaintiff left his plough on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plough still being there. In June, 1880, the defendant, a neighboring farmer, borrowed the plough of Hibler to plough a field, supposing the plough to be Hibler's, and having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plough which he had used, and demanded of him pay for the use and the return of the plough or its value, and the defendant not comply-

ing, the plaintiff brought an action of trover for the plough. The justice before whom the suit was instituted, and the Common Pleas on appeal, each gave judgment for the plaintiff for the value of the plough. The judgment of the Pleas is now before us on *certiorari*, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant.

In order to maintain an action of trover, it is necessary to prove a conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by MR. JUSTICE DEPUE in *Woodside v. Adams*, 40 N. J. Law, 417, in these words: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel."

This subject has quite recently received considerable discussion in the Exchequer Chamber and House of Lords of England, in *Fowler v. Hollins*. The facts upon which the court finally settled as the basis of decision, made the case a plain one of conversion. They were, that one Bayley had fraudulently come into possession of thirteen bales of cotton belonging to the plaintiff, and had sold and delivered them to the defendant, who bought in good faith, and who then sold and delivered them in good faith to Micholls & Co. Here was clearly an exercise of dominion over the goods by the defendant inconsistent with the plaintiff's right. But in the course of the cause some of the judges thought that, according to the case reserved, the defendant, in the transfer from Bayley to Micholls & Co., dealt only as broker and agent of the latter, and in examining the goods, receiving them from Bayley and forwarding them to Micholls & Co., acted without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another; and so the question was raised, whether such a possession of the goods, and such an asportation amounted, in law, to a conversion. Many of the English cases were commented on at length by MR. JUSTICE BRETT, in both tribunals, and he insisted, with great force and clearness, upon a negative response. BYLES, J., and KELLY, C. B., expressly concurred in this opinion, and the other judges in the Exchequer Chamber seem not to have disagreed with it in point of law, but they rested their conclusion upon a different view of the facts. In the House of Lords, MR. JUSTICE BLACKBURN expressed his opinion that the defendant was liable, because he both entered into a contract with Bayley, and also assisted in changing the custody of the goods, and so knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls & Co. that they might dispose of them as their own. This he deemed a conversion by the defendant, no matter whether

he acted as broker or not. In the course of his remarks he lays down the principle that one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodian is the true owner, or has the authority of the true owner, should be excused from what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody. He concedes, moreover, that this is not the extreme limit of the excuse, and doubts whether it would be a conversion for a miller to grind grain into flour and return the flour to the person who brought the grain, before he heard of the true owner. Under the definition of MR. JUSTICE DEPUE, above quoted, this act of the miller would be a conversion, because it changed the quality of the owner's goods. MR. BARON CLEASBY, while concurring with those who looked upon the defendant as a principal, and therefore guilty, says with reference to this view, that he was a broker merely: "How far the intermeddling with the goods themselves by delivering them would" involve a broker in responsibility to the owner, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in such case could be regarded as having an independent possession of the goods and delivering them for the purpose of passing the property." MR. JUSTICE GROVE advised the house in favor of the plaintiff, on the ground that the defendant intermeddled with goods which were not his own, and exercised a dominion over them inconsistent with the right of the true owner. MR. BARON AMPHLETT concurred with BRETT. LORD CHELMSFORD, CHANCELLOR CAIRNS, and LORDS HATHERLEY and O'HAGAN advised for the plaintiff, in substance, because the defendant had exercised dominion over the plaintiff's property by disposing of it to Micholls & Co.

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, *i. e.*, ownership, over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged.

In a very late case in Massachusetts (*Spooner v. Manchester*, 133 Mass. 270), a similar view is expressed. FIELD, J., there says: "Conversion is based upon the idea of an assumption of property or a right of dominion over the thing converted, . . . and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not, in themselves, imply an asser-

tion of title or of a right of such dominion over such property will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it. . . . Whether an act involving the temporary use, control, or detention of property implies an assertion of a right of dominion over it may well depend upon the circumstances of the case and the intention of the person dealing with the property."

To the same effect is *Laverty v. Snethen*, 68 N. Y. 522.

In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plough. He received it for temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor, from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion.

This being so, his subsequent failure to deliver the plough to the plaintiff on demand was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not refuse to deliver, but could not. *Ross v. Johnson*, 5 Burrows, 2825; *Bank v. Wheeler*, 48 N. Y. 492; *Magnin v. Dinsmore*, 70 N. Y. 410.

The plaintiff contends that the evidence on the part of the defendant as to his conversation with Hibler at the time of borrowing the plough was illegal. It was not, however. It being proper to show that the defendant came into possession of the plough, the declarations of himself and of the person from whom he received possession, contemporaneous with the transfer and indicative of its character, were admissible as part of the *res gestæ*. *Luse v. Jones*, 39 N. J. Law, 707; *Hunter v. State*, 40 N. J. Law, 495.

The judgment below should be reversed.

ACTIONABLE BY WHOM.**ARMORY V. DELAMIRIE.**

(1 Strange, 505.—1722.)

Coram PRATT, C. J., at *nisi prius*.

The plaintiff, being a chimney sweeper's boy, found a jewel, and carried it to the defendant's shop (who was a goldsmith), to know what it was, and delivered it into the hands of the apprentice, who, under pretense of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the jury that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

GORDON V. HARPER.

(7 Term Reports, 9.—1796.)

TROVER for the conversion of household furniture seized and sold by defendant, a sheriff, under a writ against one Borrett in favor of one Broomhead. Borrett had sold the furniture to the plaintiff, who had leased same, with the house in which it was seized, to one Biscoe, and the lease had not yet expired. Verdict for plaintiff, subject to the opinion of the court.

ASHEURST, J. I have always understood the rule of law to be that, in order to maintain trover, the plaintiff must have a right of property in the thing, and a right of possession, and that, unless both these rights

concur, the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenants of the premises; but, supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term.

GROSE, J. The only question is whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time nor the right of possession. The common form of pleading in such an action is decisive against him, for he declares that, being possessed, etc., he lost the goods. He is therefore bound to show either an actual or virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession, as against a tort-feasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession, and he would be a trespasser if he took the goods from the tenant. Then, by what authority can he recover them from any other person during the term? It is laid down in some of the books (1 Bac. Abr. 45; 5 Bac. Abr. 257; 2 Com. Dig. tit. "Detinue, D") that trover lies where detinue will lie, the former having in modern times been substituted for the old action of detinue. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not apply to that extent; but certainly it may be said to be a good criterion. But it is clear in this case that detinue would not lie, because the plaintiff had no right to the possession of the specific goods at the time. And, if not, it is a strong argument to show that trover, which was substituted in lieu of it, cannot be maintained by the present plaintiff. Much stress has been laid on what was said in *Ward v. Macauley*, 4 Term R. 489; but the only question there was whether trespass would lie under these circumstances, and it was not necessary to determine how far trover might be maintained. It appears now very clearly upon examining that point, that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and, when that is determined, perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

*Postea to the defendant.*¹

¹ Opinions by LORD KENYON, CH. J., and LAWRENCE, J., omitted.

DEMAND AND REFUSAL.**PEASE v. SMITH.**

(61 New York, 477.—1875.)

APPEAL from a judgment of the general term of the Supreme Court, affirming a judgment entered upon a verdict in favor of the plaintiffs, and an order denying a motion for a new trial.

Plaintiffs were book-sellers and stationers in Albany. Defendants dealt largely in materials used in the manufacture of paper. Their course of business was to buy from junk shops and small dealers rags, old paper, etc., in bales, and to sell to the manufacturers. They bought, among others, from one Perry, a junk dealer. Among the materials purchased from Perry were a lot of law blanks belonging to the plaintiffs, which had been stolen from them by one Mason, who was a porter in their employ. Certain bales of paper, containing said law blanks, were shipped and sold to Allen Brothers, paper manufacturers at Sandy Hill, and by them used in the manufacture of paper. The good faith of the defendants in the transaction was not questioned.

DWIGHT, C. There are several objections raised by the defendants on this appeal.

I. It is claimed that the judge erred at the trial in refusing to grant a nonsuit, because the defendants bought the goods in controversy in the course of trade, and had sold them before any claim was made by the owners. It is insisted by the appellant that it is a prerequisite to a valid claim for conversion, in such a case, that a demand should have been made for the goods while they were in the defendants' possession, and before their sale, and that there can be no conversion, unless control over the property was exercised with knowledge of the plaintiffs' rights. This proposition is untenable. The assumed sale by the porter of the plaintiffs to Perry was wholly nugatory, and conveyed no title. *Saltus v. Everett*, 20 Wend. 267; *McGoldrick v. Willets*, 52 N. Y. 612. On like grounds, the sale by Perry to the defendants was without effect. They were constructively in possession of the plaintiffs' property without the consent of the latter. They even sent their own carts to transfer the goods when sold to Allen Brothers. This exercise of an act of ownership or dominion over the plaintiffs' property, assuming to sell and dispose of it as their own, was, within reason and the authorities, an act of conversion to their own use. The assumed act of ownership was *inconsistent* with the dominion of the plaintiffs, and this is of the essence of a conversion. Knowledge, and intent on the part of the defendants,

are not material. So long as the defendants had exercised no act of ownership over the property, and had acted in good faith, a demand and refusal would be necessary to put them in the wrong and to constitute conversion. Until such demand, there is no apparent inconsistency between their possession and the plaintiffs' ownership. After a sale has been made by the defendants, they have assumed to be the owners, and will be estopped to deny, in an action by the lawful owner, the natural consequences of their act, and to resist an action for the value of the goods. The principle is well stated by ALDERSON, B., in *Fouldes v. Willoughby*, 8 M. & W. 540: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times and in all places." In the same spirit, "conversion" is defined, in a very recent case, to be an unauthorized act which deprives another of his property permanently or for an indefinite time. *Hiort v. Bott*, L. R. 9 Ex. 86 [A. D. 1874]. So, it is said in *Boyce v. Brockway*, 31 N. Y. 490, that a wrongful intent is not an essential element in a conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it. See *Hollins v. Fowler* (House of Lords, July 6, 1875). No manual taking, on the defendant's part, is necessary. *Bristol v. Burt*, 7 J. R. 254; *Connah v. Hall*, 23 Wend. 462. The case of *Harris v. Saunders*, 2 Strobb. Eq. 370, resembles closely the case at bar. The defendant, having the property of the plaintiff in his own hands by purchase from one who had no title, sold it to another, who carried it beyond the plaintiff's reach, and received the purchase-money. These acts were held to amount to a conversion, though the defendant was not aware of the plaintiff's title. As, according to these views, the conversion took place at the moment of the unauthorized sale by the present defendants, no demand was necessary, the sole object of a demand being to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion. *Esmay v. Fanning*, 9 Barb. 176; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Glassner v. Wheaton*, 2 E. D. Smith, 352; *Munger v. Hess*, 28 Barb. 75. After a wrongful taking and carrying away of the property, the cause of action has become complete without further act on the plaintiff's part. *Brewster v. Silliman*, 38 N. Y. 423; *Hanmer v. Wilsey*, 17 Wend. 91; *Otis v. Jones*, 21 id. 394.

* * * * *

On the whole, no error was committed at the trial, and the judgment of the court below should be affirmed.

All concur.

Judgment affirmed.

GALVIN v. BACON.

(11 Maine, 28.—1833.)

THIS was an action of replevin for a horse. On trial before WESTON, Justice, it appeared that the horse was originally the property of the plaintiff. That the defendant bought him of one McAllister, he of one Scott, and Scott of one Staples, to whom the horse had been delivered by the plaintiff for use for a limited period and under the expectation of a purchase by Staples. The horse in question was delivered at each of these sales, and it was agreed that Scott, McAllister, and the defendant respectively, purchased *bona fide* for a valuable consideration, and without notice of any claim or interest in the plaintiff. There was no evidence that the plaintiff had made any demand on the defendant for the horse prior to the bringing of this action. Whereupon it was insisted that the plaintiff had failed to support the action. But with a view to have the jury pass upon the question of general property which was in controversy, the presiding Judge ruled otherwise. The jury returned their verdict for the plaintiff. If, upon the foregoing ground, he had failed to make out a case, entitling him in the opinion of the Court to retain it, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered thereon.

WESTON, J. Where a party is rightfully in possession of property belonging to another, he does not unlawfully detain it, until after a demand by the true owner and a refusal. But if the taking is tortious, no such demand is necessary. This is a principle uniformly applied in actions of trover. In *Gates v. Gates*, 15 Mass. 311, and in *Seaver v. Dingley*, 4 Greenl. 306, the same rule is understood to apply in cases of replevin. In some other cases cited, as in *Hussey et al. v. Thornton et al.*, 4 Mass. 405, and in *Marston v. Baldwin*, 17 Mass. 606, this point does not appear to have been taken.

It is assumed in argument, on the part of the counsel for the defendant, that his possession was lawful, and that a demand was necessary by the plaintiff, to enable him to maintain replevin. And if his premises are correct, he is sustained in his position, by some of the cases cited. The possession of the defendant did not subject him to the imputation of anything morally wrong. He acted in good faith, having purchased of one whom he supposed to have been the rightful owner; as did two others, who successively purchased and sold the horse in question. But their supposition did not accord with the fact. The horse was from the beginning the property of the plaintiff; and he had never authorized either of these sales.

Whoever takes the property of another, without his assent express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful, which is not justified or warranted by law; and of this character may be some acts, which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner; and he could convey none to another. The purchaser is not liable to be charged criminally, because innocent of any intentional wrong; but the owner may avail himself against him of all civil remedies, provided by law for the protection of property. If the bailee of property for a special purpose, sells it without right, the purchaser does not thereby acquire a lawful title or possession.

In the case before us, Staples was rightfully in possession of the horse, but he had no right to sell him; if he had, the plaintiff would, upon the sale, have ceased to be the owner, which has been negatived by the verdict. It does not follow, because his possession was rightful that those who hold under him are also lawfully in possession. Indeed, the very reverse is true. Staples had the horse by the assent of the owner; but he sold him in his own wrong, and in violation of the rights of the plaintiff. The defendant came honestly by the horse, but he did not receive possession of him from anyone authorized to give it, and is therefore liable *civiliter* to the true owner for the taking, as well as for the detention.

Judgment on the verdict.

ROSUM v. HODGES.

(1 South Dakota, 308.—1890.)

ACTION for conversion. Judgment for plaintiff. Defendant appeals.

KELLAM, J. Respondent was the owner of certain flaxseed in his granary, on his farm in Minnehaha county. During his absence from home, and without his knowledge or consent, Gerde, his hired man, hauled to appellants' elevator, and sold and delivered to appellants, a quantity of such flax, receiving the pay therefor. Appellants bought innocently, supposing Gerde had a right so to sell. Immediately after the sale, Gerde absconded with the proceeds, with the exception of a small amount, noticed hereafter. The action was brought against appellants

for the conversion of the flax. Respondent had judgment, and appellants appeal.

* * * * *

The next assignment alleges error in the charge of the court upon the question of authority of Gerde to sell the flax. We do not stop now to examine this instruction in respect to the error alleged, for the reason that there is no evidence in the case tending in any degree to show authority, either express or implied, in Gerde to sell the flax. If the jury had so found under any instruction, we think it would have been the duty of the court to set such verdict aside.

The next and last assignment is that the court erred in charging the jury that no demand was necessary before bringing the action. The question as to whether, without previous demand, an action for the conversion of personal property can be maintained against an innocent purchaser of such property from one who tortiously obtained the same from the owner, has been and still is the subject of frequent and elaborate discussion in the courts. In *Stanley v. Gaylord*, 1 Cush. 536, the question was examined at great length, both upon principle and as affected by the rules applicable to and distinguishing the actions of trespass, trover and replevin, and the court concludes (WILDE, J., dissenting) that trespass may be maintained without demand. In *Hyde v. Noble*, 13 N. H. 494, it was held that the purchase of property from one who had no power to sell, when the purchaser took a delivery of it, and retained possession under the sale, was in itself a conversion by the purchaser, sufficient to enable the owner to maintain trover against him without a previous demand. In *Trudo v. Anderson*, 10 Mich. 357, the court held that, where one's property is disposed of without authority by the person having it in charge, the owner may bring replevin therefor without a previous demand, and he may do this notwithstanding the property is in the hands of one who has bought in good faith, and without notice of the title of the real owner; and, after discussing at some length the necessity of a previous demand in such a case, the court says: "We do not think the question of intent or of good faith in a party receiving possession from a wrongful taker in such cases, and where the owner has been guilty of no wrong or negligence, can have any bearing upon the right of recovery in a civil action for the property or its value, and such is clearly the weight of authority both in England and in the United States." And this doctrine was reiterated in *Ballou v. O'Brien*, 20 Mich. 304. It is also so held in *Galvin v. Bacon*, 11 Me. 28; *Mining Co. v. Tritle*, 4 Nev. 493; *Clark v. Lewis*, 35 Ill. 417; *Shoemaker v. Simpson*, 16 Kan. 43; *Eldred v. Oconto Co.*, 33 Wis. 133; *Smith v. McLean*, 24 Iowa, 322. In an early case in New York, *Storm v. Livingston*, 6 Johns. 44, a contrary doctrine was announced, and has been adhered

to in that state. In *Barrett v. Warren*, 3 Hill, 348, Cowen, J., referring to the rule announced in *Storm v. Livingston*, and followed in later cases in New York, used the following significant language: "I will not, however, deny that an exception in favor of the taker, where he is a *bona fide* purchaser from the wrong-doer, has found its way into the books; nor that, however discordant it be with established principles, it may, at least in this state, have become too inveterate to be displaced." The rule adopted in New York seems also to have been followed in Indiana. See *Wood v. Cohen*, 6 Ind. 455, and *Conner v. Comstock*, 17 Ind. 90. In *Eldred v. Oconto Co.*, *supra*, the supreme court of Wisconsin, after noticing the fact that the New York courts have uniformly held as above indicated, says: "But we find a decided weight of authority the other way, and we are satisfied that the New York rule is not sound in principle." Upon principle, it is not easy to give a satisfactory reason why the true owner, who has been guilty of no wrong or negligence, should be prejudiced by a transaction between the wrongful taker of his property and a third person, or how such a transaction can impose upon him a new obligation. Having been guilty of no act impairing, or in any manner qualifying, either his right of property or his right of immediate possession, he may assert such right whenever and wherever he finds his property. The wrongful taker had no rightful possession against the true owner, and he could convey none to another. In this case the respondent was deprived of the possession of his property by the tortious, if not felonious, act of Gerde, and appellants' claim to the same comes through such tortious taking. The taking did not deprive respondent of his right in and to the property so taken, neither could its sale by the wrongful taker. It remained the absolute property of respondent, as much after as before the sale. The possession of appellants being wrongful as against respondent, the true owner, no previous demand was necessary before bringing suit for the property or its value. Referring to the apparent equity of the New York doctrine as applied to cases where the purchaser was clearly innocent, the supreme court of Michigan says, in *Trudo v. Anderson*, *supra*: "The principle upon which the New York rule rests might properly have some weight with the court upon a question of costs where these are discretionary, or might justify the legislature in refusing costs to the plaintiff where a previous demand could have been made without serious risk or inconvenience, and the suit has been brought without such demand; but we think the principle of the rule cannot properly be extended to the right of action." Upon the case presented by the evidence, the instruction complained of was correct. The judgment of the district court is affirmed. All the judges concurring.

ESMAY V. FANNING.

(9 Barbour, 176.—1850.)

ACTION of trover for a carriage.

The cause was referred to a referee, who reported that he found as facts that about June 1, 1846, the plaintiff loaned to the defendant the carriage in question, to be safely kept by the defendant for the plaintiff, and to be re-delivered to the plaintiff on request; that the defendant had been requested to redeliver the same to the plaintiff; that the defendant and plaintiff might each use the carriage and the defendant's horses when he chose; that the carriage was obtained by the defendant from the livery stable of George L. Crocker, then of Albany city, and that he kept it safely till about November 1, 1846, during which time it was used occasionally by both parties, plaintiff and defendant. That about November 1, 1846, it was returned by the defendant to the stable of said Crocker; *which return of the carriage to the stable of Crocker, the referee decided was not a re-delivery of the carriage to the plaintiff or his agent.* He, therefore, reported in favor of the plaintiff for the value of the carriage at that time, on which judgment was thereupon given, as for a conversion of the carriage, and the defendant therefrom appealed.

By the Court, WILLARD, J. The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant. 3 Barn. & Ald. 685. The general requisites to maintain the action are, property in the plaintiff; actual possession or a right to the immediate possession thereof; and a wrongful conversion by the defendant. 4 Barb. S. C. R. 565. The plaintiff's title was not disputed in this case. The issue is on the conversion: or, in other words, it is whether the defendant re-delivered the carriage to the plaintiff or his agent, before the commencement of this suit. The plaintiff alleges a refusal to re-deliver it, and the defendant avers that he did re-deliver it. The referee found the fact that the defendant did not re-deliver the carriage to the plaintiff or his agent; and the proof is that Crocker, to whom the defendant did deliver the carriage, in November, 1846, was not, at that time, the agent of the plaintiff, or authorized to receive it. And there is no evidence that the plaintiff ever assented to that delivery. The question, therefore, becomes narrowed down to this: whether a bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it. In *Devereux v. Barclay*, 2 Barn. & Ald. 702, it was held that trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery was

occasioned by mistake only; and this court, in *Packard v. Getman*, 4 Wend. 613, held that the same action would lie against a common carrier, who had delivered the goods, by mistake, to the wrong person. The same point was ruled by Lord KENYON in *Youl v. Harbottle*, Peake's N. P. Cases, 49, and by the English Common Pleas in *Stephenson v. Kent*, 4 Bing. 476. If trover will lie against a common carrier or a warehouseman for a mis-delivery, it can, under the like circumstances, be sustained against a bailee for hire or a gratuitous bailee. It results from the very obligation of his contract, that if he fails to restore the article to the rightful owner, but delivers it to another person, not entitled to receive it, he is guilty of a conversion. Story on Bail. § 414.

The referee found as a fact that the carriage was not re-delivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding, and it cannot be disturbed by this court. We think the referee drew the right conclusion from that fact, and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city, the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable, at the time the defendant first received it, did not authorize him, under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent. The place of delivery of the carriage was the plaintiff's residence. *Barns v. Graham*, 4 Cowen, 452; Story on Bail. §§ 257, 261, 265. A delivery elsewhere, without authority, was a conversion. We have not adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it. Story on Bail. § 117.

It was not necessary in this case to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant, until it had been demanded, and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred. A demand is necessary whenever the goods have come lawfully into the defendant's possession; unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which amounts to an actual conversion. 2 Leigh's N. P. 1483; *Bates v. Conklin*, 10 Wend. 389; *Tompkins v. Haile*, 3 id. 406. As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion, proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore, to prove a demand was immaterial, and the decision of the referee refusing to permit the defendant to prove what he said at the time the demand was made, could have no influence on the result of the cause. Had a demand been

necessary, the declaration of the defendant in answer to the demand would have been admissible, as well on the part of the defendant as of the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument on the *implied* obligations resulting from the various kinds of bailments, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject, in this case, because here there was an *express* agreement to return the property *to the plaintiff*, on request.

The judgment must be affirmed.

HETT V. BOSTON & MAINE RAILROAD.

(69 New Hampshire, 139.—1897.)

TROVER to recover property of plaintiff delivered to defendant for transportation. After the surrender of the goods to plaintiff, but while they were still in the car, they were attached as the property of another. Plaintiff thereafter demanded the property of defendant's agents, who refused to deliver except on payment of charges for freight and an extra charge for the detention of the car while under attachment. Plaintiff refused to pay the extra sum, and the agent refused to deliver the goods until advised by headquarters. This action was brought, and on the following day the agent informed plaintiff that the extra sum was remitted. Judgment for defendants.

CARPENTER, C. J. "To constitute a conversion, there must be some exercise of dominion over the property in repudiation of, or inconsistent with, the owner's rights." *Evans v. Mason*, 64 N. H. 98; *Baker v. Beers*, 64 N. H. 102. A refusal to deliver property to the owner upon his demand is not of itself a conversion. It is evidence tending to show a conversion, but, like other inconclusive acts, is open to explanation. It is a sufficient answer that it is not in the power of the defendant to comply with the demand. *Johnson v. Couillard*, 4 Allen (Mass.) 446. When the plaintiff made the demand upon the defendants at Nashua, the property was not in their possession. By the attachment it passed into the custody of the law. *Verrall v. Robinson*, 2 Crompt. M. & R. 495; *Stiles v. Davis*, 1 Black, 101, 17 L. Ed. 33; *Osgood v. Carver*, 43 Conn. 24, 30; *Fletcher v. Fletcher*, 7 N. H. 452. It was as effectually out of their possession and beyond their control as it could have been if the sheriff had removed it from the car and carried it away. They could not lawfully

prevent the officer from taking it, nor retake it from his possession. *State v. Fifield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208. Instead of asserting, they disclaimed, any dominion over the property, by informing the plaintiff that it was not in their possession, but in the custody of the law.

The refusal of the defendants' station agent at Portsmouth to deliver the goods unless the plaintiff would pay or promise to pay the charge of \$8 for the detention of the car at Nashua presents a different question. It is not necessary to determine whether the plaintiff was liable to the defendants for that charge. It may be assumed that he was not. The agent informed the plaintiff that he had no authority to deliver the property without payment of the \$8, but offered to deliver it on payment of that sum (to be refunded if his employers should find the charge unwarranted or remit it), or upon a promise to pay in case they should not remit it, and, neither of these propositions being accepted, declined to deliver the goods until he could communicate with the defendants and obtain instructions.

If there is a reasonable doubt of the defendant's right to the possession of the property, a refusal to deliver it until a reasonable opportunity is had to ascertain his right is not sufficient evidence of a conversion. In such a case the law does not require one to act on the instant, and either comply with or deny the demand at his peril. *Robinson v. Burleigh*, 5 N. H. 225; *Fletcher v. Fletcher*, 7 N. H. 452; *Sargent v. Gile*, 8 N. H. 325, 331; *Vaughan v. Watt*, 6 Mees. & W. 492; *Hollins v. Fowler*, L. R. 7 H. L. 757, 766. It is immaterial on what particular point, material to the justice of the demand, the doubt exists. It may arise upon the question of lien by the holder, or the amount of the lien, as well as upon the identity or authority of the person making the demand. Where the facts are undisputed, and the doubt is upon a question of law, a refusal to deliver until the advice of counsel can be obtained may be considered as the result of a reasonable hesitation in a doubtful matter. *Cushing v. Breck*, 10 N. H. 111, 116; *Eastman v. Association*, 65 N. H. 176. Upon the facts stated, it could not be found that the station agent's doubt whether the charge for the detention of the car was lawful, and whether the defendants would insist upon or waive its payment, was not a reasonable doubt; and his refusal to deliver the property until he could obtain the defendants' instructions was not sufficient evidence of a conversion. The question whether the time required for, or occupied in, procuring the instructions, was reasonable (*Sargent v. Gile*, 8 N. H. 325, 331), does not arise, because the plaintiff brought his action immediately after the demand.

Whether the same result might be reached upon the ground that the plaintiff's demand upon the station agent, who he knew had no authority to comply with it, was not a demand upon the defendants

(*Pothonier v. Dawson*, Holt, N. P. 383; 3 Starkie, Ev. 1500; Poll. Torts, 291; *Storm v. Livingston*, 6 Johns. 44; *Mount v. Derick*, 5 Hill [N. Y.], 455; *Goodwin v. Wertheimer*, 99 N. Y. 149), is a question not considered.

Judgment for the defendants.

BLODGETT, J., did not sit. The others concurred.

MERE ASPORTATION.

FOULDES V. WILLOUGHBY.

(8 Meeson & Welsby, 540.—1841.)

TROVER for two horses. Plea, not guilty.

The defendant was the manager of a ferry over the Mersey river, from Birkenhead to Liverpool, and on October 15, 1840, the plaintiff embarked on one of defendant's boats at Birkenhead, with two horses, for the carriage of which he paid the usual fare. It was alleged that the plaintiff misconducted himself after he came on board the boat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of an hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the boat and was conveyed over the river to Liverpool. On the following day, the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not do so, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold at auction. The defense set up at the trial was, that the plaintiff had behaved improperly on the boat, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury, that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the boat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of

the horses. Verdict for plaintiff with £40 damages, the value of the horses.

A rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages.

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare *asportavit* is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned Judge was wrong, in telling the jury that the simple fact of putting these horses on shore by the defendant, amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and, on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner nor any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be, that

those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued, that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all: but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from Strange's Reports, of *Bushell v. Miller*, 1 Stra. 128, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom House Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead, that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the Court there said, that whatever ground there might be for an action of trespass, in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be

made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held, that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the Judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think, was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say, that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned Judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent

with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it; and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrongdoer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go, if their argument in this case be sound. But such is not the law; and the true principle is that stated by CHAMBRE and HOLROYD, Js., when at the bar, in their argument in the case of *Shipwick v. Blanchard*, 6 T. R. 299, that "In order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion. For these reasons, I think, in the case before us, the question ought to have been left to the jury, to say, whether the act done by the defendant, of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, *i. e.*, with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

GURNEY, B. If it had been left to the jury, on the whole of the evidence in this case, to say whether a conversion had taken place or not, I think there was abundant evidence from which they might have drawn an affirmative conclusion. But the Judge only left that question to them on one part of the evidence, namely, that of the defendant's taking these horses out of the boat, and putting them ashore; and I cannot agree to the position, that that act, standing alone, amounts to a conversion.

ROLFE, B. I quite concur with the rest of the court. During the argument I had some little doubt, owing to the difficulty which I felt in defining what is a sufficient exercise of an act of ownership over chattels to amount to a conversion, so as to support an action of trover, as

distinguished from such an interference with it as will only afford ground for an action of trespass. But that such a distinction does exist in law between these actions, in this respect, appears from the long list of cases to be found in the books on the subject; so that, whatever difficulties may be experienced in applying that distinction, its existence must be recognized. In all the cases on this subject, there has been proof of a trespass having been committed; but there was a further question, namely, whether there was not a conversion also. In every case of trover, there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession. Now suppose, instead of actually removing the horses from the boat, the defendant had waved his hand, or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson, any other answer could be given than in the affirmative: for if the principle be that anything which controls the position of the chattel while in my possession will amount to a change of ownership, I do not see how the effecting of that change by frightening the animal which constitutes my property, is distinguishable from any other means adopted for the same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? Or suppose a man drives his carriage up into an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited, of *Bushell v. Miller*, where a party was held to have a right to move certain goods of another person, provided he put them back again: his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser *ab initio*; but it is clear that there was no conversion of the chattel. So that we find the distinction to which I have alluded, between trespass and trover, continually recognized in law. I quite agree with my Brother GURNEY, that if the learned Judge in the present case had not put the conversion to the jury as founded on the single fact of taking the horses on shore, but had left it for their consideration on the whole case as it stood, not only was there evidence of a conversion, but there was such as would have fully warranted the jury in coming to the conclusion at which they arrived. The question, however, was not so left to the jury, and this rule to set aside the verdict for misdirection must therefore be made absolute.

Rule absolute.

O. J. GUDE CO. v. FARLEY.

(25 Miscellaneous, 502.—1898.)

APPEAL from a judgment of the municipal court, rendered in favor of the defendant.

GIEGERICH, J. The defendant's grantor, one James McEnery, by indenture bearing date the 27th day of March, 1897, demised and leased to one Daniel McMenamey the building and its appurtenances located at Nos. 106 and 108, Myrtle avenue, in the then city of Brooklyn, for a term of one year from the 1st day of May, 1897, at an annual rental of \$1,350, with the privilege of renewal yearly for the four succeeding years, upon compliance with certain conditions. The lessee therein covenanted that he would neither assign said lease, nor underlet the whole or any part of the premises described, except the second and third floors, nor make any alterations therein without the written consent of the lessor, under penalty of forfeiture and damages; and that at the expiration of such lease he would surrender to the lessor, in good condition, possession of the said premises. Notwithstanding this, the lessee, on the 4th day of December, 1897, without the consent of the lessor, and in violation of the terms of the lease, signed and delivered to the plaintiff a paper writing granting to the latter the use of the roof of said building for a period of five years from January 1, 1898, "with the right of placing, painting, erecting, and maintaining any and all advertising signs" thereon. The plaintiff, under authority of such instrument, on or about December 30, 1897, erected upon said roof a sign 10 feet high and about 25 feet long, and constructed of wood and iron. About a day later, to wit, December 31, 1897, the fee in said premises was transferred by defendant's grantor to defendant, subject, however, to all the terms contained in the aforesaid lease. The defendant thereupon, and after McMenamey and the plaintiff had refused to comply with his request, had the sign removed, and stored in his cellar, and notified the plaintiff that it was at its disposal. This action was then brought to recover the value of the sign, plaintiff claiming that it had been converted by defendant to his own use.

It appears from the evidence that McMenamey occupied only the first or store floor of the premises thus demised, which were 25 feet square, and three stories high. According to a stipulation entered into upon the trial, it also appears that defendant's grantor collected no rent from the tenant (McMenamey) at any time after the erection of the sign, and that no rent became due to him after that date. The remarks of the trial justice, wherein he concludes that the facts, as

provided, did not constitute a conversion, are fully concurred in by me. "If a man who has no right to meddle with goods at all takes them, and removes them from one place to another, an action may be maintained against him for a trespass; but he is not guilty of a conversion of them unless he removed the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or of some other person." 2 Add. Torts (6th Ed.) p. 626, § 519. "It has never yet been held," observes the learned author, "that a single act of removing a chattel independent of any claim over it, either in favor of the person himself or any one else, amounts to a conversion." Id. p. 627. The principle is an elementary one, and is succinctly defined by Greenleaf, viz.: "Every unlawful taking, with intent to apply the goods to the use of the taker, or of some other person than the owner, or having the effect of destroying or altering their nature, is a conversion. But if it does not interfere with the owner's dominion over the property, nor alter its condition, it is not." 2 Greenl. Ev. (15th Ed.) § 642.

In *Houghton v. Butler*, 4 Term. R. 364, where a gate had been wrongfully erected by the plaintiff so as to obstruct the defendant's right of way, and the latter took it down, and put it in a convenient place for the use of the plaintiff, it was held that this did not amount to a conversion.

A similar doctrine prevailed in *Fouldes v. Willoughby*, 8 Mees. & W. 540, where the plaintiff was requested by the defendant, the manager of a ferryboat upon which the former was a passenger, to leave the boat, and take ashore his horses, and upon his refusal to comply therewith the defendant removed the horses to a stable and they were not delivered up on the following day when sent for by plaintiff. Later, however, a message was sent by their custodian to the effect that plaintiff might have his horses upon payment for their keep, and that, in the event of his failure to do so, they would be sold to satisfy the cost of their maintenance. The horses were accordingly sold at auction, and an action in trover was then brought by the plaintiff. The defense was that the plaintiff had misconducted himself while on board, and that the horses were put ashore for the purpose of inducing him to follow them. On the trial, at *nisi prius*, the judge charged "that the defendant, by taking the horses from the plaintiff, and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses." The court of exchequer, on a rule to show cause, held that this amounted to a misdirection, in that the mere wrongful asportation of a chattel did not amount to a conversion, unless its taking or detention was with intent to convert it to the use of the taker, or some third person, or unless the act had the effect either of destroy-

ing or changing the quality of the chattel. In the course of his opinion (pages 544, 547), LORD ABINGER said:

"It is a proposition familiar to all lawyers that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. . . . In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them by himself, or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. . . . But it has never been held that the single act of removal of a chattel independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel."

BARON ALDERSON (page 549) recognized as the true principle the statement of counsel in *Shipwick v. Blanchard*, 6 Term R. 299, that, "in order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or for the use of those for whom he is acting"; but with the additional qualification that, in the event of their destruction while in the custody of the taker, the latter would be guilty of a conversion. In summing up the precise situation, he, at page 549, said:

"But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot."

BARON GURNEY (page 550) also disagreed with the position, that the defendant's act alone of taking the horses out of the boat, and putting them ashore, amounted to a conversion. The following is a literal quotation from the views expressed by BARON ROLFE:

"In every case of trover there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's possession. Now, suppose instead of actually removing the horses from the boat, the defendant waived his hand or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson, any other answer could be given than in the affirmative; for, if the principle be that anything that controls the position of the chattels while in my possession will amount to a change of ownership, I do not see how the effecting of that change by frightening the animal which constitutes my property is distinguishable from any other means adopted for the same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse

to my own use? Or suppose a man drives his carriage up into an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not."

The foregoing rules were distinctly recognized and applied in the case of *Eldridge v. Adams*, 54 Barb. 417. There the plaintiff left to the defendant a buggy which he had hired for a year from one Jenkins. The wagon was injured while in use by one Hall, and the plaintiff, after its return to him, sent it to the shop of a man named Francisco, for repair. Hall afterwards promised the plaintiff that he would pay for such repairs, and the defendant became his surety therefor. Subsequently the defendant and Hall had the wagon removed to another shop for repair, and, before suit was brought, returned it to the custody of the plaintiff. A verdict was directed for the plaintiff, subject to the opinion of the court at general term, but the latter tribunal held that the defendant was not liable, and accordingly directed judgment in his favor. Held by the court (per JAMES, J., page 423):

"The defendant in this case was guilty only of a mere asportation of the buggy. He did not interfere with the plaintiff's dominion over the buggy. His title was recognized and acknowledged throughout. It was not taken or detained with the intent to convert it to the defendant's use, or the use of any one else. He assumed no ownership over it. It was not injured while in his possession. In fact, there was no element in the proof on which a conversion could be predicated."

The defendants in *Farnsworth v. Lowery*, 134 Mass. 512, wrongfully removed certain glass plates from a case to which they claimed title, and of which they took possession, and left said plates in the custody of the person who had theretofore held the case. Held insufficient to maintain an action for conversion of the plates, even if plaintiffs were ignorant of their whereabouts. The opinion there is by FIELD, J., who thus sums up the evidence:

"It is contended that this wrongful removal of the plates from the case was a conversion, because it is an exercise of dominion over them inconsistent with the rights of the plaintiffs. But the dominion which the defendants exercised in removing the plates from the case was exercised, not by virtue of any claim of property in the plates, or of any right of possession or control over the plates, but by virtue of a claim of a right of property in the case with which the plates were connected; and there is no evidence recited which would have warranted the jury in finding that the defendants removed the plates from the case for any other purpose than that of separating the property of the plaintiffs from the case which the defendants claimed to own, that they might take and carry away only the property they claimed. Such a wrongful intermeddling with plates, we think, does not amount to a conversion.

There was no intent to deprive the plaintiffs of their property in, or of their rights of possession over, the plates, and no actual deprivation. The removal was incidental to the taking and carrying away of the case, and the plates continued in the custody of the person who, so far as appears, was in possession of the room in which the case was placed, and had the custody of the case. The evidence of a conversion is no stronger than if it proved that a stranger without right had taken the plates from the case, and left both in the room. This would be a trespass, but not a conversion." Page 519.

The foregoing principles were also applied in *Shea v. Milford*, 145 Mass. 525, where the town, one of the defendants, contracted with the firm of Mead, Mason & Co. for the construction of a granite stone building, and the latter sublet the stonework thereon to the plaintiff. Before the structure was completed the plaintiff was requested by both the contractors and the town's agent to remove to another part of the land certain chattels which had been used by him in the performance of his work, and upon his refusal the defendants, without unnecessary damage, removed the same to another part of the land. It was there held by W. ALLEN, J., that, even had the plaintiff an unrevoked license to have the chattels on the land, an action for conversion could not be maintained.

"The evidence," he says, "negatived a conversion of the property by the defendants, and showed that they had no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use."

I think the principle is fairly deducible from these authorities that the mere removal of a chattel from one place to another, in the absence of any claim of ownership or the exercise of any dominion thereover, does not amount to a conversion. It might at first sight be claimed that the foregoing views are at variance with the principles of the decision in *Roe v. Campbell*, 40 Hun, 50, but there the facts were entirely different. The plaintiff had sold a buggy, conditionally to one Broderick, retaining in himself the title thereto until a note given for the purchase price should be met. Before the note matured, however, Broderick sold the wagon to the defendant, and the plaintiff brought a suit for conversion. The distinction becomes apparent from a reading of the following portion of the opinion, delivered by SMITH, P. J., found on page 52:

"If the defendant, on being notified of the plaintiff's title and demand of possession, had simply stored the wagon in his barn at Wolcott, where it was at the time of the demand, while he was availing himself of the plaintiff's consent to take time to consider whether he would comply with the demand, he would not have been liable."

In the case at bar the defendant seems to have acted upon the theory that the agreement between plaintiff and the lessee operated as a subletting, rather than a license, thus causing the prohibitive clause against subletting contained in the lessor's lease to become operative, and, by virtue of the deed, vesting in the defendant title to the sign, upon its annexation, as part of the freehold, and that, therefore, the plaintiff had neither property, general or special, nor the immediate right of possession, therein or thereto. Whether or not this position is well taken need not be considered in view of the conclusion above reached anent the defendant's freedom from liability for his acts. The latter having at the very outset requested the plaintiff and McMenamy to remove the sign from the roof, and they having failed to comply therewith, its removal was obviously not made for the purpose of depriving the plaintiff of ownership therein, but merely to change its position from a part of the building where defendant claimed it had no right to be. Under these circumstances, and in view of the fact that the defendant apprised plaintiff that the sign was subject to its order, of which the latter did not avail itself, it is clear, upon principle and authority, that the defendant's acts in the premises did not amount to a conversion. Such notice by the defendant to the plaintiff was, in my opinion, a positive recognition of the latter's ownership of the sign, and inconsistent with the idea of the former's exercising dominion over it. For these reasons, to my mind, the judgment should be affirmed.

BREKMAN, P. J., concurs.

*Judgment affirmed.*¹

¹ Cited in *Hammond v. Sullivan*, 112 App. Div. 788.

INJURIES IN FAMILY RELATIONS ¹

SEDUCTION: MINOR DAUGHTER.

HEWITT v. PRIME.

(21 Wendell, 79.—1839.)

ACTION on the case for the seduction of a minor daughter of the plaintiff, whilst she was a member of her father's family. In addition to the testimony of the daughter, the plaintiff proved by a practising physician that, about the time of her pregnancy, the defendant had applied to the physician for drugs to produce an abortion, and, upon one occasion,

¹ "It seems that prior to the statute of laborers (23 Edw. III., 1349) no action at law lay for any injury involved in such relations. The preamble of this statute recites the mortality consequent on the pestilence of that time, and referred to 'the grievous incommunities which of lack, especially of plowmen and laborers, may hereafter come.' Among other provisions, it imposed heavy penalties on every person who procured, harbored, or retained the servant of another during the time he had contracted to serve. From this statute arose the actions commonly called '*per quod* actions,' because of the peculiar wording of the pleadings. The action lay under the statute by the employer against a third person who interfered with the relationship of his servant, '*per quod servitium amisit*.' This was easily adapted so as to be used by a father for the seduction of his child, and by a husband for abuse by a stranger of his wife (in the form of pleading, '*per quod consortium amisit*')." Jaggard on Torts, I., 447.

"The common law gave the father an action for the seduction of his daughter, but regarded it as an action for trespass for assaulting his servant, whereby he lost her services; later, an action on the case was allowed, and it is now well settled that the action may be brought in either form.

"The action was based upon the relation of master and servant, and not upon that of parent and child, and the measure of damages was such only as a master would recover for a disabling injury to his servant. The extent of the recovery has been enlarged by the courts from the necessity of the case, rather than from the principles which govern the action, until compensation is awarded to the parents as such, for the shame and mortification which that wrong brings upon him and his family. No action could be maintained by the father for the injury in his parental capacity, but in the struggle between substantial justice to the parent and the precedents in actions for seduction, the courts have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation as master, and permitting a recovery in his relation as parent." XXI. Am. & Eng. Enc. of Law, 1009.

stated that the female gotten with child was the plaintiff's daughter. The jury found for the plaintiff, and the defendant asks for a new trial.

By the Court, NELSON, CH. J. The witness (the physician), I think, was not privileged. It is very doubtful whether the communication made to him by the defendant can be considered as consulting him professionally, within the meaning of the statute; and it is certain, that the information given was not essential to enable him to prescribe for the patient, if the daughter of the plaintiff should be considered a patient in respect to the transaction. 2 R. S. 406, § 73.

The judge ruled in the course of the trial that no *actual loss of service, expense or damage*, prior to the commencement of the suit, need be shown; that the proof of the seduction was sufficient under the circumstances; pregnancy having ensued, and the daughter being a minor and a part of her father's family at the time. It is now fully settled both in England and here, *Maunder v. Venn*, 1 Mood. & Malk. 323, Peake's N. P. 55, 233, 2 Stark Ev. 721, 9 Johns. R. 387, 2 Wendell, 459, 7 Carr. & Payne, 528, that *acts of service* by the daughter are not necessary; it is enough if the parent has a right to command them, to sustain the action. If it were otherwise, says LITTLEDALE, J., in *Maunder v. Venn*, no action could be maintained for this injury in the higher ranks of life, where no actual services by the daughter are usual. After this, I do not perceive how we can consistently maintain, that proof of *actual loss of service* is indispensable to uphold the action. If it may be sustained upon the mere right to claim them, or in the language of the cases, upon the supposed services, where none were ever rendered in fact, the ground of it, in the supposed case, precludes the possibility of any actual loss. Such is the spirit of the more recent cases, as will be seen by a reference to those above cited.

It was conceded by Hullock, Sergeant, for the defendant in *Revill v. Salterfit*, 1 Holt, 450, that in most of these cases, the condition of service was regarded as a mere conveyance to the action. It was the form, he said, through which the injury was presented to the court; and having obtained its admission, upon legal principles, it brought along with it all the circumstances of the case.

The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the *mere right to claim* the services; they frequently admitted the most trifling and valueless acts as sufficient. In the case of *Clark v. Fitch*, 2 Wendell, 459, there was no proof of actual loss. And *Martin v. Payne*, 9 Johns. R. 387, was decided upon the ground that none were necessary. The only actual *liability* of the father that appeared in the former case, were for the expenses of the lying in, which have never been regarded as the foundation of the suit:

they are received in evidence only by way of enhancing the damages. It is apparent from a perusal of the modern cases, and elementary writers in England, upon this subject, that the old idea of *loss of menial services*, which lay at the foundation of the action, has gradually given way to more enlightened and refined views of the domestic relations: these are, that the services of the child are not alone regarded as of value to the parent. As one of the fruits of more cultivated times, the value of the society and attentions of a virtuous and innocent daughter, is properly appreciated; and the loss sustained by the parent from the corruption of her mind and the defilement of her person, by the guilty seducer, is considered ground for damages, consistent with even the first principles of the action. The loss of these qualities, even in regard to menial services, would necessarily greatly diminish their value.

The action then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages. It is not necessary that these should transpire before suit brought; if they are the natural consequences of the guilty act, they are but the incidents which attend, and give character to it.

Upon these views I concur with the learned judge who reviewed the case below, in denying a new trial.

New trial denied.

DAIN V. WYCOFF.

(7 New York, 191.—1852.)

ACTION by the plaintiff for the seduction of his daughter. A verdict for one thousand dollars was rendered for the plaintiff. A motion for a new trial, made upon a bill of exceptions, was denied by the general term of the Supreme Court, and judgment given upon the verdict.

It appeared by the bill of exceptions that Sally Dain, the plaintiff's daughter, when about fourteen years of age, was bound as an apprentice to the defendant, who shortly after seduced her and had criminal intercourse with her frequently, until she was sixteen years of age, when she became pregnant. She was then induced by him to take drugs with a view to produce an abortion, but the attempt to do this was unsuccessful and she gave birth to a living child.

GARDINER, J. . . . 3. The defendant moved for a nonsuit upon the ground that the relation of master and servant did not subsist between the plaintiff and his daughter when she was seduced. It appeared

that she was the apprentice of the defendant and bound to live with him until she was eighteen, and that the seduction occurred while she was thus in fact and in law the servant of the defendant. The relation of master and servant is the foundation of the action for loss of service (4 Comstock, 38, and cases there cited). The plaintiff to maintain the action must have had the right to the service of his daughter. But he proved that she not only resided with the defendant but owed him service when the injury was committed. Unless the defendant procured the daughter to enter into his service with a view to her seduction, of which there is no pretence, the plaintiff should have been nonsuited.

We all agree that the judgment should be reversed, for the reason last suggested. My brethren express no opinion upon the other points in the case.

WELLS, J. [After stating the facts.] It is abundantly settled by authority that in order to sustain an action of this description it must appear that the relation of master and servant existed at the time the injury complained of was committed. The action is founded on the loss of service, and in order to maintain it the relation must be actual or constructive. If the plaintiff is not receiving the services of his daughter at the time he must be in a situation and have the legal right to command them at pleasure. In this case the plaintiff's daughter was not at the time she was seduced and got with child his servant but was the servant of the defendant, who had the legal right to and was actually receiving her services. In the late case of *Bartley v. Richtmyer* (4 Comst. 38), BRONSON, CH. J., has given the whole subject of the principles of this action a full examination, and it is unnecessary to repeat the views which are there so well stated. The case is in point and in effect decides this. According to the principles held by this court in the case referred to it is impossible for the plaintiff in the present case to sustain an action upon the proof which was given at the trial.

Judgment reversed and new trial ordered.

MARTIN V. PAYNE.

(9 Johnson's Rep. 387.—1812.)

ACTION of trespass on the case, for debauching and getting with child the daughter of the plaintiff.

At the time of the seduction, she was nineteen years of age, and lived with and worked for her uncle, from whom she was to receive one shilling per day, expending same in clothes and necessaries for herself, as she

saw fit. There was no agreement for her continuance in her uncle's house for any particular time; but she went to reside with him, on the terms stated, with the consent of her father. During the period of such residence, she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched, she returned to her father, who supported her, and was at the expense of her lying in, etc. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining at her uncle's house.

The cause was submitted to the jury, against the objection of the defendant, and a verdict was returned in favor of the plaintiff.

SPENCER, J. The case of *Dean v. Peel*, 5 East, 49, is against the action. It was there held that the daughter being in the service of another, and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this subject. It has frequently been decided, that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant, in such a case. In *Bennet v. Alcott*, 2 Term Rep. 166, the daughter was thirty years of age, and BULLER, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in *Postlethwaite v. Parks*, 3 Burr. 1878, the action is not maintainable. In *Johnson v. M'Adam*, cited by Topping in *Dean v. Peel*, WILSON, J., said that where the daughter was under age he believed the action was maintainable, though she was not part of the father's family when she was seduced, but when she was of age, and no part of the father's family, he thought the action not maintainable. In *Fores v. Wilson*, Peake's N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, *per quod*, etc. LORD KENYON held that there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the *supposed* relation of master and servant, though everyone must know that such a child, cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding-school, de-

bauched and gotten with child, on what principle can the father maintain the action, but on the *supposed* relation of master and servant, arising from the power possessed by the father to require menial services; for in such a case, there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case supposed is perfectly analogous to the one before us: here the father merely permitted his daughter to remain with her aunt: he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant *de jure* though not *de facto*, at the time of the injury, and being his servant *de jure*, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and, therefore, deny the motion for a new trial.

Motion denied.

ABRAHAMS V. KIDNEY.

(104 Massachusetts, 222.—1870.)

TORT for the seduction of plaintiff's minor daughter, "whereby she became sick and unable to render service to the plaintiff." The following bill of exceptions was allowed:—"The declarations contained no allegation, and it was not contended, that the defendant's seduction of the plaintiff's daughter was followed by pregnancy or any sexual disease. Evidence was offered to show that, by reason of the seduction, and the general injury to the health of the daughter consequent thereon, it became necessary for the plaintiff to send her to New York for her health, and that, by so sending her, the plaintiff incurred great expense, together with the loss of her services. But the judge excluded this evidence, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant which was done; and the plaintiff alleged exceptions."

MORTON, J. At the trial of this case, the plaintiff offered to show that, by reason of the seduction, and of the general injury to the health of the daughter consequent thereon, she lost the services of her said daughter. It having appeared that the defendant's seduction of the daughter was not followed by pregnancy or by any sexual disease, the presiding judge excluded the evidence, and ruled that the action could not be maintained. The bill of exceptions is very brief, and does not

state the grounds upon which the ruling was based; but we think that, upon a fair construction of it, the ruling was to the effect that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease. We are of opinion that this ruling was erroneous.

The rule which governs the numerous cases upon this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action where the connection causes pregnancy or sexual disease applies to all cases where the proximate consequence of the criminal act is a loss of health resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or sexual disease, causes bodily injury, impairing the health of the servant and resulting in a loss of services to her master. So the criminal connection may be accomplished under such circumstances, as, for instance, of violence or fraud, that its proximate effect is mental distress or disease, impairing her health and destroying her capacity to labor. In either of these cases the master may maintain an action, because the loss of services is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. *Vanhorn v. Freeman*, 1 Halst. 322. But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of services is too remote a consequence of the criminal act, and the action cannot be maintained. *Boyle v. Brandon*, 13 M. & W. 738; *Knight v. Wilcox*, 4 Kernan, 413.

In the case at bar, as the ruling appears to have been general, that the action could not be maintained unless pregnancy or sexual disease was proved, we think a new trial should be granted.

Exceptions sustained.

*SEDUCTION: ADULT DAUGHTER.**SUTTON V. HUFFMAN.**(32 New Jersey Law, 58.—1866.)*

BEDLE, J. The exception in this case being so general, and the charge depending so much upon its application to the facts, it becomes necessary, in order to determine its correctness, to state the evidence pretty fully. The action was brought by Adam Huffman, for the seduction of his daughter and servant, Margaret Ann, by Emanuel Sutton. As the result of it, a child was born on the eleventh day of April, 1861. The daughter, at the time of the seduction, was about twenty-two years of age, and the act occurred, not at her father's house, but at her brother Gilbert's, who lived about a mile from the father's. Gilbert was an unmarried son of the plaintiff, and lived upon a farm called the Sutton farm, which appears to have been owned by the defendant's father. In the spring of 1859, Gilbert left his father's house to commence farming for himself, and first occupied what is called the Cranmer farm. Margaret Ann went with him, she then being under the age of twenty-one years. He remained upon said farm one year, and then moved upon the Sutton farm. The plaintiff testified that Gilbert rented the Cranmer farm, moved on it, and was single, and had no housekeeper; and that he told him he could have Margaret Ann whenever they could spare her. That she did not go there to receive wages; that she was with Gilbert a good part of the time there, and was at home some; that she came home very often on Saturdays and staid over Sunday, and sometimes would be at home nearly two weeks; that while Gilbert lived on the Sutton farm, she was about half the time there and the other half at her father's house; that she had part of her clothing at Gilbert's but the chief part was at the plaintiff's house; that she had to have part at each place; that when she was at her father's, she did whatever her mother told her; that she milked, churned, got the meals, did housework, washing and sewing; that the plaintiff did not pay her any wages, except such clothes as she needed, and he found her all her clothing, both while she was on the Cranmer farm and the Sutton farm; that her mother would send her shirts to make, and dresses for her sister. (The father's family consisted of his wife and ten children, eight boys and two daughters—Margaret Ann, and her sister, who was nine years old.) That the child was born at the plaintiff's house, the physician's bill was paid by him, and he furnished her with everything necessary for her comfort during sickness, and considered himself bound to do it. These leading facts were also substantially testified to by

Gilbert and Margaret Ann. In addition to them, Margaret Ann and Gilbert swear that Gilbert did not pay her any wages, and there was no agreement that he should. Margaret Ann testified that she always went to Gilbert's with the intention of returning to her father's, and that she was subject to the control and direction of her father while on the Cranmer and Sutton farms. The defendant sought to show, by the declarations of Margaret Ann and Gilbert, that Gilbert was to give her one dollar per week and half the poultry. Other evidence was offered by defendant to show that while on the Cranmer farm she had certain nice dresses there; also that Margaret Ann and Gilbert would sometimes go to the store and each purchased things and be charged to Gilbert, the particulars of which do not appear; also, that some shoe-making was done for her and charged to Gilbert. This evidence, together with some other of a general character, was offered, undoubtedly, to show that the relation of master and servant did not exist between the plaintiff and his daughter, but that she had left her father's house to do for herself.

A general exception was allowed to the whole charge upon the relationship of master and servant, which charge includes the observations of the justice both upon the facts and the law. I will refer to such parts of the charge only as are objected to upon legal grounds.

The court charged that "it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her.

"*And first.* Did the relation of master and servant exist between the father and daughter? This form of issue is adapted to the cause of loss of service merely, and was no doubt, in its origin, used to recover only the damages sustained by such loss and the expenses of the accompanying sickness. But in cases of this kind, the loss of service has long ceased to be considered the true *gravamen* of the action. The real damages sought to be recovered, are those occasioned, not by two or three months' illness of the daughter, but the permanent disgrace inflicted upon her and her family, and thus subjecting the father to permanent sorrow. Notwithstanding this change in the object of the action, the form still continues, *and though the amount of service may be very small, still the fact must be proved in order to sustain it.* In its present scope, this action is the only civil remedy for this kind of trespass. Your doubts, if you entertain any upon the first point, may be solved by answering two questions.

"*First.* Did Margaret render any habitual service at or about the time she was debauched?

"*Second.* Was she emancipated?

"As to the first question, if you believe her father, brother and herself, you cannot doubt that she did serve him at his home occasionally,

in the usual way of service by daughters at home, and by sewing for the family while at her brother's. The service need not be of any particular kind, quality, or amount. Was *any* service lost by the injury, is the question. It need not be menial service, which in law means within walls, or house service, nor need it be continuous, or from day to day, nor need the daughter live in the family if she serves out of it. *In short, any accustomed service lost by the injury* will sustain the action, provided it be *service due*, and not a mere voluntary courtesy, and service will be regarded as due, unless the child is emancipated.

"*Second.* Was Margaret emancipated? The arrival at twenty-one years does not emancipate a child; if the parent continues to exercise authority and the child to submit to it, the emancipation does not occur; and this is the case with most unmarried daughters, whose parents are able to support them."

After referring to the evidence generally, and reflecting upon it, the court then stated to the jury that emancipation was a *question of intention*, and further said: "With these suggestions, I leave it with you to determine, whether Margaret or her father, or either of them, intended that she should be free of his control, and without title to his support and protection at *the time of the injury*. I do not think that the fact that she received wages, or by agreement between her and Gilbert, was to receive wages, if that was so, of much, if any, importance to the question. This was a matter between her and Gilbert, and does not affect her position toward her father, unless she engaged her whole time to Gilbert, and that for a period that would indicate her intention to be free from her father. The proof will hardly sustain this view. You have that testimony before you, and must give it such weight as you think it deserves. It consists altogether of hearsay of what Gilbert and Margaret said. It is only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay."

It is first objected that the question, "did the relation of master and servant exist between the father and daughter?" does not specify the time when such relation should exist. This objection is more technical than real. Immediately before putting that question, the court charges that "it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her." The jury could not have understood from this language otherwise, than that the daughter must be the servant at the time of the seduction. The expression cannot fairly be construed to mean anything else; and besides that, the court in submitting the question of emancipation to the jury, expressly applies it "at the time of the injury." If the defendant desired it more definite than stated, he should have requested it at the trial.

The other objections amount in brief to this: that Margaret, at the time of the seduction, was over the age of twenty-one years, and in the actual service of her brother for wages, and that, therefore, she could not then be the servant of her father, so as to sustain this action. In the first place, it is not proved that she did receive wages from her brother. As was correctly remarked by the judge at the circuit, the proof of what Gilbert and Margaret had said about that was "only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay;" but then if there had been competent evidence of the fact that she received wages, that in itself was not necessarily inconsistent with the relation of master and servant between her and her father. *Brown v. Ramsay*, 5 Dutcher, 121. It was not necessary that she should be in the *actual service* of the father at the time of the seduction, if the relation of master and servant then existed. It is true, that loss of service in fact, though very slight, must be shown, where the daughter is over twenty-one years, the law not presuming service, as in a daughter under age, yet the loss of service, in most cases where there is no personal violence, occurs months after the seduction. If the relation of master and servant existed at the time, and the service lost afterwards was due the parent by virtue of such relationship that existed at the seduction, it is sufficient to sustain the action. If, by reason of the act, the master could not have the benefit of a service due him, by virtue of a relation then existing, even if he did not choose to exact it before, he is entitled to his action. The receipt of wages by the daughter would be a fact as bearing upon the question of emancipation, but beyond that it would not be inconsistent with the child being unemancipated, unless, as remarked by the judge, "she engaged her whole time to Gilbert, and that for a period that would indicate her intention to be free from her father." It does not so appear in the case, and the court wisely said, "the proof made will hardly sustain that view." As this case stands upon the evidence, the receipt of wages, if proved, would not be inconsistent with Margaret being unemancipated and the servant of the plaintiff.

When the daughter went to her brother's she was under the age of twenty-one years; while there she attained the age of twenty-one. The attaining that age is not *ipso facto* an emancipation of the child. That is the well-settled law of this state. *Overseers of Alexandria v. Overseers of Bethlehem*, 1 Harr. 122; *Ridgeway v. English*, 2 Zab. 409; *Brown v. Ramsay*, 5 Dutch. 117.

It is true that the father may then refuse to further support and provide for the child, and the child may then refuse to serve or submit to the control of the parent, but unless either the parent or child has in fact effected the emancipation, the reciprocal rights and duties of the parent and child, as to service and support, are presumed to exist as

before the age of twenty-one. Whether emancipation has occurred, is a question of fact, to be determined by the circumstances of the case, according to the intention of the parties. Such circumstances in favor of a continuance of the relation, may consist of a tacit consent on the part of the child to serve as before, and on the part of the parent to provide as before. The conduct of each to the other may exist as before without any special contract, or understanding, and emancipation would not be accomplished. The parent or child, or either of them, may stand upon their rights to dissolve the relation at that time, if they wish, and if they do, in fact, the relation of master and servant is ended, but if they do it not in fact, and they tacitly continue—the child to submit to the authority of the parent, and to serve him in such way as is usual for children, and the parent to exercise authority and provide for the child as before—the child is unemancipated, and third parties are bound to respect it. *Lipe v. Eisenlerd*, 32 N. Y. 229.

The question of emancipation, as one of fact, was distinctly left by the judge to the jury, and I find nothing in the charge inconsistent with the rule of law as laid down. The facts, as they appear in the case, would justify the jury in finding the daughter not emancipated. If she was not emancipated, then the action would be sustained by proof of loss of any service to which the plaintiff was entitled. Upon that point the judge charged “that any service lost by the injury is the question;” and further, “in short, any accustomed service lost by the injury will sustain the action, provided it be service due, and not a mere voluntary courtesy, and service will be regarded as due unless the child is emancipated.” If the child was not emancipated, service performed will be regarded as due the parent. The parent can sustain the action for the services of an unemancipated child over twenty-one years. *Brown v. Ramsay*, 5 Dutcher, 118.

In the absence of proof that the parent and child, in the performance of service by the child, had contracted with each other, as strangers, the law holds that service done by an unemancipated child is done because it is due to the parent. The service, as already stated, need not be rendered on the day of the injury. If the injury had occasioned any loss of service due by virtue of the relation, though the loss has been sustained long after the injury, it is sufficient. The charge upon this question was entirely correct. It was objected that the question, “did Margaret render any habitual service at or about the time she was debauched?” should have been confined to the time of the debauchment. This objection is already sufficiently answered, for the case does not proceed upon the idea that actual service is necessary at that time. The fact of habitual service about the time she was debauched, was important, as showing the relation of the child to the parent—how they were accustomed to act towards each other. If before the seduction, and after, as was

proved by the plaintiff, she did serve her father when at home, in the usual way of a daughter, and did also serve him at her brother's, by sewing for her father's family, it showed a recognition on her part of the continuance of the relationship that existed before she was of age. These acts of service, covering the time she was at Gilbert's, or about the time of the seduction, were of the utmost importance upon that subject.

The two questions—one as to the habitual service, and the other as to emancipation—cover the whole case upon the relation of master and servant. The judge expressly stated, their doubts, if they had any upon that question, could be solved by answering those two questions, and those questions were correctly put and explained to accomplish that end. I see no error in the charge, and the judgment must, therefore, be affirmed.

Affirmed.

CHIEF JUSTICE BEASLEY, and JUSTICES ELMER and VREDENBURGH concurred.

ACTION BY MOTHER, WHEN.

SOUTH V. DENNISTON.

(2 Watts, 474.—1834.)

WRIT OF ERROR. This was an action on the case by Sarah South, plaintiff in error, against Joseph Denniston, for the seduction of plaintiff's daughter. The action was instituted by the mother, a widow, during the minority of the daughter. The latter went to live with the defendant's father at the age of eleven, and continued there until her seventeenth or eighteenth year, when the seduction took place, and she was begotten with child by the defendant. She continued to live at the house until the month of June following, when she returned to her mother, with whom she lived until the child was born, in November. Her mother attended her during her lying-in sickness, before which and after her return she assisted her mother about the house. The court below instructed the jury that the plaintiff was not entitled to maintain the action. This was the subject of the assignment of error.

GIBSON, C. J. An action on the case for the seduction of a daughter is founded exclusively on the relation of master and servant, not parent and child; and the gist of it is consequential loss of service. By reason of a father's duty to educate and maintain his infant children he stands

in the place of a master to them while he retains the right of personal control, even as to such of them as are not under his immediate dominion. But if this right be divested or expired, the relation can be renewed but by actual service, which, to found an action for the interruption of it, must have existed at the doing of the act of which the interruption is a consequence; the difference between it and any other state of servitude being that slighter acts of service are evidence of it. If, however, the right of control be not finally parted with, its existence without actual service is a sufficient foundation for a title to the action; and the decision in *Dean v. Peel*, 4 East, 49, that actual employment in the service of another without an intent to return to the father's protection is fatal to an action in his name, has been justly repudiated, because his right to his daughter's service is independent of her will. But a mother, being at best in the category of a father who has parted with his right, can maintain the action but on proof of actual service at the time of the seduction. Not being bound to the duty of maintenance, she is not entitled to the correlative right of service; and standing as a stranger to her daughter in respect to these, the relation of mistress and servant can be constituted between them but as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it. These are the fundamental principles of the action, deducible from all the authorities but *Sargent's Case*, 5 Cowen, 106, and from that case we are constrained to dissent. There it appears to have been decided that a widow whose daughter has been debauched, while out at service under indentures of apprenticeship subsequently cancelled, might maintain the action on the ground that she had succeeded to the parental rights of her husband; or else that the daughter was in her service at the time of the birth. But nothing is more sure than that a mother is not entitled to the service of her child by the common law; and the decision therefore obviously rests on some statutory provisions devolving the parental rights of the father upon his widow, which is not in force here. Yet even that would seem to be inadequate to the maintenance of the action by a widow who had parted with her right without reservation or recall; and even taking for granted that it reverted to her at the cancellation of the indentures, still it did not exist for the purpose of sustaining the relation of mistress and servant at the time of the seduction. The action was therefore not maintainable on the last ground, according to the decision of the same court in *Nickleson v. Stryker*, 10 Johns. 117. But whatever may have been decided, it requires but little aid from authority to sustain a principle so palpable as that a party cannot entitle himself to an action for what was no wrong to him, by employing a disabled servant. An action for loss of service would certainly not lie for beating one who was not in the plaintiff's service at the time, because it would be esteemed an act

of folly in him to employ an unfit person; and it must necessarily be indifferent, in point of principle, whether the unfitness were caused by beating or impregnation. It was so considered in *Logan v. Murray*, 6 Serg. & Rawle, 175, where the daughter had come pregnant into the mother's service, after the death of her father, in whose service she had been debauched. As to the child-bed expenses, assuming that the mother is liable to bear them (though we certainly have no law for it), these, though proper to swell the damages, are not a substantive ground of the action, as was held in *Logan v. Murray*; and as to the argument so earnestly pressed upon us, that she is entitled to compensation for the increased risk of becoming chargeable for the daughter's maintenance as a pauper, it is enough to say that it would make the mother's right depend on the contingent inability of the daughter to maintain herself, which is not the foundation of the action by a father, whose duty to maintain is an immediate one and independent of all consideration of the child's own means. Besides, the principle would give the same right of action to the daughter for the seduction of the mother, and might, under circumstances, entitle the servant to damages for the impregnation of her mistress. That would be an inversion of the principles of the action laid down by this court in *Hornketh v. Barr*, 8 Serg. & Rawle, 39; the authority of which is amply sufficient to sustain the decision of the court below. The daughter, residing in the family of the defendant's father at the time of the seduction, could in no respect be considered her mother's servant; and her subsequent acquirement of the character, if she ever did acquire it, could not vest in the latter a title to the action.

*Judgment affirmed.*¹

¹ In *Gray v. Durland*, 51 N. Y. 424, 429, HUNT, C., says: "The question is not plainly brought before us, is a widowed mother entitled by law to the services of her minor child? But, rather, has she such a claim to the services of her child, when actually in her service, as gives a right of action against another who renders the child incapable of performing them? (See 1 Bl. Com., 453; 4 N. Y. 47; 31 Maine, 240; 14 Ala. 235; 4 Binney R. 488; *Contra*, Reeves Dom. Rel. Gould ed., 1862, 420; 2 Kent Com. 190, 193, 217; 19 Wend. 306; 7 John. R. 157.)

"The second one would seem to be reasonably clear upon the authorities. They establish the rule that when there is an actual performance of duty by the injured female to a parent, or to one standing *in loco parentis*, such person can sustain the action for a loss of service arising from her being debauched. Upon this principle it is held that the father can maintain an action for the seduction and confinement of a daughter after she became of age, who is in his actual service. (*Lipe v. Eisenlerd*, 32 N. Y. 229.)

"In *Marvel v. Thompson*, 2 Car. & P. 303, an action by an uncle was sustained under similar circumstances. In *Edmeston v. Mitchell*, 2 Term R. 4, the action was brought by an aunt. In *Bracy v. Kibbe*, 31 Barb. 273, the action was by the step-father. In *Irwin v. Dearnan*, 11 East, 23, the action was by one who had adopted the seduced person; and in *Sergeant v. ———*, 5 Cow. 106, by the mother."

In *Hammond v. Corbett*, 50 N. H. 501, FOSTER, J., says: "We, having failed to dis-

ACTION BY SEDUCED PARTY.**PAUL V. FRAZIER.**

(3 Massachusetts, 71.—1807.)

THE declaration was in case for that the defendant at, etc., begun to court the plaintiff under a pretence of a design to marry her, and having under that pretence gained her affections, got her with child and afterwards utterly forsook her; whereby she hath been greatly injured in her reputation, hurt in her peace of mind, etc., to her damage \$2,000.

The defendant pleaded not guilty, and upon issue joined the plaintiff obtained a verdict for \$1,000. Upon defendant's motion the court below arrested the judgment, and from that decision the plaintiff appeals.

PARSONS, C. J. This is an action of the case to recover damages against the defendant for seducing the plaintiff under a false pretence of courtship and intention of marriage, and for getting her with child, whereby her reputation has suffered, and her peace of mind been injured. After a verdict for the plaintiff on the issue of not guilty, the defendant moves to arrest the judgment. And we are of opinion that judgment must be arrested. An action of this nature is not given by statute; and there is no principle of the common law, on which it can be sustained. Fornication and adultery are offences in this commonwealth created by statute. And the declaration amounts to a charge against the defendant for deceiving the plaintiff and persuading her to commit a crime, in consequence of which she has suffered damage. She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting.

It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider, before they provide this

cover any sensible ground for a distinction between the rights of a father and those of a widowed mother, are inclined to hold that, in whatever principle this right is founded, whether it result from the very nature of maternal duties or from that of authority which, upon the husband's death, devolves upon her by reason of the guardianship for nurture, technically speaking, the mother is entitled to the child's services until her rights are superseded by the appointment of another guardian, or the arrival of the child at years of majority." See, also, *Gray v. Durland*, 50 Barb. 100, 218-221.

In *Cuming v. Brooklyn City R. R. Co.*, 109 N. Y. 95, 100, it is said, however, that "the legal obligation of maintenance and support resting on the mother is especially imperfect. In all cases it necessarily can be enforced only in cases of the pecuniary ability of the parent, and in case of the mother, the child's means are first chargeable with his support."

remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage: and if seduction has been practised under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided; and we do not profess to be wiser than the law.

MARRIAGE PROMISE AND SEDUCTION.¹

TUBBS v. VAN KLEEK.

(12 Illinois, 446.—1851.)

TRUMBULL, J. This was an action for a breach of a promise of marriage. Jury trial, and a verdict of a thousand dollars in favor of the plaintiff below. It was proven, on the trial, that the plaintiff had given birth to a child, and the court, at her instance, instructed the jury as follows:

“That if the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, and under the pretense and promise of marriage, seduced and begot the plaintiff with child,

¹ “It has been much questioned, whether, in an action to recover damages for the breach of a promise of marriage, damages for seduction may be recovered. It has been distinctly held in Kentucky and Pennsylvania, that in such action seduction cannot be given in evidence in aggravation of the damages. *Weaver v. Bachert*, 2 Barr, 80; *Bucks v. Shain*, 2 Bibb, 341; see, also, *Perkins v. Hersey*, 1 R. I. 493. On the other hand, the rule adopted in Massachusetts, New York, and several other States, is, that where seduction has been practised under color of a promise of marriage, the jury may consider it to aggravate the damages in an action on the contract. *Paul v. Frazier*, 3 Mass. 73; *Whalen v. Layman*, 2 Blackf. 194; *King v. Kersey*, 2 Carter, 402; *Tubbs v. Van Kleek*, 12 Ill. 446; *Wells v. Padgett*, 8 Barb. 323; *Green v. Spencer*, 3 Miss. 318; *Conn v. Wilson*, 2 Overton, 233.” *Espy v. Jones*, 37 Ala. 379, 382.

In *Sheahan v. Barry*, 27 Mich. 217, evidence of seduction in aggravation was objected to as incompetent, but the court (p. 219) said: “A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection. But in case of seduction there is added to this a loss of character, and social position, and not only deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong; but a refusal to marry makes the seduction a very grievous element of injury, that cannot be lost sight of in any view of justice.”

In New York, seduction under promise of marriage is a crime. See Penal Law, §§ 2175-2177.

that circumstance, and violation of faith, should be taken into consideration by the jury, in estimating the damages."

The giving of this instruction is assigned for error, which is the only question in the case.

There is some conflict in the authorities, as to whether seduction committed under promise of marriage, is admissible in evidence, to aggravate the damages in an action for the breach of such promise, but the weight of authority, as well as the reason of the thing, appear to be decidedly in favor of the admission of such evidence. The only cases, to which reference has been made, as establishing a contrary doctrine, are those of *Bucks v. Shain*, 2 Bibb, 343, and *Weaver v. Bachert*, 2 Pa. State R. 80.

In the first of these cases, the promise to marry was made at a period subsequent to the seduction, and, as was well remarked by the court, the seduction could not have been the consequence of the promise. In such a case, when an action was brought for the breach of the marriage promise, it would clearly be erroneous to allow damages on account of an injury inflicted before the promise was made, and which could not have resulted from it. The case of *Weaver v. Bachert*, is based upon that of *Bucks v. Shain*, and so far as it goes, is an authority against the admission of proof of seduction in an action for a breach of marriage promise, but the reasoning of the court in that case, is by no means satisfactory. The decision is placed upon the ground that illicit intercourse is an act of mutual imprudence, and that *volenti non fit injuria*; also upon the further ground, that the father has a distinct action for the seduction of his daughter, and that to allow the daughter to recover also, would be to subject the seducer to the payment of double damages.

- It is possible, but hardly probable, that a case may arise where both parties are equally culpable, but the instruction under consideration, does not suppose such a case. It is based upon the presumption, that the jury believe from the evidence that the defendant, under pretense of marriage, enticed the plaintiff from the path of rectitude and duty; and in such a case, to say that both parties were equally in fault, would be to confound the innocent with the guilty, and to visit the same condemnation on the party defrauded, as on him committing the fraud; nor is it true, that illicit intercourse is usually an act of mutual imprudence. In a vast majority of cases, the female is imposed upon, and the consequences attending such intercourse are visited upon her with ten-fold severity. In this case, the parties are not presumed to be *in pari delicto*, but the instruction presupposes a cheat on the part of the man. It is like the case, where a man promised to marry a woman, on condition that she would go to bed with him that night, which she did. It was objected, in an action, by the woman upon this promise, that it was *turpis contractus*, but LORD MANSFIELD said he thought the objec-

tion would not lie, "because the parties were not *in pari delicto*, but this was a cheat on the part of the man." *Morton v. Fenn*, 26 E. C. L. R. 80. So a bond given to a woman in consideration of past cohabitation, has been held good at law. *Turner v. Vaughan*, 2 Wilson, 339. In answer to the objection, that the bond was given for an immoral consideration, CLINE, Justice, said: "I am in a court of law, and not in an ecclesiastical court; if a man has lived with a girl, and afterwards gives her a bond, it is good."

It is also a mistaken notion, to say that a father has a distinct cause of action for the seduction of his daughter. No action lies by the father simply for the seduction, but he may have an action for the loss of service occasioned by the lying-in of his daughter, and it is only by a fiction of law, invented by the courts, that he is allowed damages in that action for the seduction. The damages, even then, are only such as he may have sustained in the disgrace brought upon his family, in his wounded feelings, or otherwise, and nothing is allowed on account of the suffering and disgrace of the daughter. It does not follow, therefore, that the seducer will be made to pay double damages for the same injury. He pays to the father for the injury done him; if the daughter is permitted to recover, it is for the injury done her, and it often happens that by one act, a wrong may be done several persons, for which, each has a right of action. Suppose a female is so unfortunate as to have no father, or person sustaining towards her that relation, which will authorize his bringing a suit for loss of service; according to the doctrine of the Pennsylvania court, her seducer under promise of marriage, is answerable to no one for the fraud he has practised upon her. Sooner than establish such a principle, it would be well to adopt the language of Chief Justice WILMOT, in the case of *Tullidge v. Wade*, 3 Wilson, 19, which was an action by the father for loss of service, where he said: "The jury have done right in giving liberal damages; and if A B brings another action against defendant, for breach of promise of marriage, so much the better; he ought to be punished twice;" but we are not driven to such extremities, the weight of authority is in harmony with the reason and justice of the case. The courts of Massachusetts, Missouri, Tennessee and Indiana, have all held, that in an action by a female for a breach of promise of marriage, her seduction by the defendant, under promise of marriage, may be given in evidence in aggravation of damages. *Paul v. Frazier*, 3 Mass. 72; *Green v. Spencer*, 3 Missouri, 318; *Conn v. Wilson*, 2 Overton, 233; *Whalen v. Layman*, 2 Blackf. 194.

The reason for these decisions is manifest. A party is always entitled to such damages as are the natural and proximate result of the act complained of. 2 Greenleaf's Ev., sec. 256.

Whatever damages, therefore, the plaintiff suffered in consequence of defendant's refusal to marry her, she is legitimately entitled to re-

cover in this action. How are these damages to be estimated, unless we look at the circumstances of the parties, and the situation in which the plaintiff is left, by the defendant's refusal to perform his contract?

All the authorities, not excepting the case in Pennsylvania, admit that parties in this action may show their circumstances, or condition in life, as matters of aggravation or mitigation. Why, then, may not a female show the situation in which she is left, by the violation of his promise on the part of a man, who has agreed to marry her? Had he performed his contract, she would have been saved from disgrace, in part at least, and her child legitimated. The direct consequence of his breach of contract is the disgrace and ruin of her whom, by means of that contract, he has seduced, and upon every principle of right and justice, he should be held responsible for the injury which his own breach of contract has occasioned.

The court in Pennsylvania asks the question "If, then, a woman cannot make her seduction a ground of recovery directly, how can she make it so indirectly?" The answer to such a question is obvious. It is everyday's practice, to give in evidence, by way of aggravating damages, circumstances which would not of themselves constitute distinct causes of action. Cases of this kind are too common to need illustration. 2 Greenleaf's Ev., secs. 55, 267. The injury done a female by the violation of a contract to marry her is not the same in all cases, and whenever such contract has been used by the party making it to inflict the most aggravated of injuries upon the woman, it is right that such injuries should be taken into consideration by the jury, in estimating the damages which he should pay for the violation of his promise. A man, who, under pretense and promise of marriage, gains the affections of an innocent girl, seduces and then abandons her, inflicts an injury, for the recompense of which money is wholly inadequate. Such a man, if he deserves the name, is entitled to no sympathy at the hands of either juries or courts, but should be made to respond in heavy damages, the only recompense which the law allows, for the commission of an act, occasioning to the person injured, more real suffering and distress, and bringing upon her greater disgrace, than any other which man can commit.

Let the judgment be affirmed.

*Judgment affirmed.*¹

¹ In the course of his dissenting opinion, TREAT, C. J., says: "There is not a single case to be found in the English Reports that countenances such a doctrine. . . . It is a legitimate inference, from the silence of the English Reports, that the principles of the common law do not sanction such a recovery. The notion seems to have originated in this country, and some of the courts, as I cannot but think, more influenced by sympathy for the party debauched or by indignation against the seducer, than by a stern adherence to the well established rules and distinctions of the common law, have seen proper to adopt it."

LOSS OF CONSORTIUM: ACTION BY HUSBAND.

BIGAOUETTE V. PAULET.

(134 Massachusetts, 123.—1883.)

TORT in four counts. The first count was for seduction of plaintiff's wife; the second and fourth were for assaults upon her; and the third was for a rape: whereby the plaintiff lost her comfort, assistance, society, and benefit. A bill of exceptions was allowed by the trial judge: The only witnesses were plaintiff and his wife. The wife testified that plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under defendant, and that they were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, defendant told plaintiff's wife that he would turn her husband away from the factory, if she refused to receive defendant's visits; that on July 5, 1876, defendant violently and forcibly ravished her; that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and defendant, and three days afterwards plaintiff was discharged from the factory by defendant; that shortly after July 5, 1876, plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her; and that she attended to and performed her ordinary domestic duties in her husband's family up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case.

The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of loss of the wife's services to enable the plaintiff to maintain this action.

The judge ruled that, as there was no evidence to support the count charging defendant with seducing plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused to plaintiff, the action could not be maintained; and directed a verdict for defendant. Plaintiff alleged exceptions.

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only. He must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the mas-

ter of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word "consortium,"—the right to the conjugal fellowship of the wife, to her company, cooperation, and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of a husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences; and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of his wife. This is illustrated in the statements of injuries to a husband in 3 Bl. Comm. 139, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the other, the author's words are: "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matter of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action; and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers v. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 Car. & P. 198; *Yundt v. Hartrunft*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought

where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by CHIEF JUSTICE HOLT, "that the law indulges the husband with an action of assault and battery for the injury done to him, though it be with the consent of his wife, because the law will not allow her consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut v. Gallisard*, 7 Mod. 78, 2 Ld. Raym. 809, Holt, 50. See, also, Bac. Abr. "Trespass," C 1; and Id. "Marriage," F 2; 2 Chit. Pl. (13th Amer. Ed.) 855; Reeve, Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind; that the corrupting of the body, rather than the mind, of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society, and benefit alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the consortium with the wife which is implied from criminal conversation with her, whether with or against her will.

Exceptions sustained.

SAME: ACTION BY WIFE.

BENNETT v. BENNETT.

(116 New York, 584.—1889.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action by a wife to recover damages for enticing away her husband.

VANN, J. The plaintiff, a married woman, brought this action to

recover damages from the defendant for enticing away her husband, and depriving her of his comfort, aid, protection and society. The defendant insists that neither at common law nor under the act concerning the rights and liabilities of husband and wife can such an action be maintained. It was provided by that statute that any married woman might, while married, sue and be sued in all matters having relation to her sole and separate property, and that she might maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole. (Laws of 1860, chap. 90, p. 158, § 7, as amended by chap. 172, Laws of 1862, p. 343.) An injury to the person, within the meaning of the law, includes certain acts, which do not involve physical contact with the person injured. Thus criminal conversation with the wife has long been considered as a personal injury to the husband. *Delamater v. Russell*, 4 How. 234; *Straus v. Schwarzwalden*, 4 Bosw. 627. And the seduction of a daughter a like injury to the father. *Taylor v. North*, 3 Code Rep. 9; *Steinberg v. Lasker*, 50 How. 432. The Code of Civil Procedure, in defining "personal injury," includes under that head, libel, slander, "or other actionable injury to the person." (§ 3343, sub. 9.)

It is well settled that a husband can maintain an action against a third person for enticing away his wife and depriving him of her comfort, aid and society. *Hutcheson v. Peck*, 5 Johns. 196; *Barnes v. Allen*, 1 Abb. Ct. App. Dec. 111. The basis of the action is the loss of *consortium*, or the right of the husband to the conjugal society of his wife. It is not necessary that there should be proof of any pecuniary loss in order to sustain the action. *Hermance v. James*, 32 How. 142; *Rinehart v. Bills*, 82 Mo. 534. Loss of services is not essential, but is merely matter of aggravation, and need not be alleged or proved. *Bigaouette v. Paulet*, 134 Mass. 125.

According to the following cases a wife can maintain an action in her own name and for her own benefit against one who entices her husband from her, alienates his affection and deprives her of his society. *Jaynes v. Jaynes*, 39 Hun, 40; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 id. 293; *Warner v. Miller*, 17 id. 221; *Churchill v. Lewis*, id. 266; *Simmons v. Simmons*, 21 id. 469.

There appears to be no reported decision in this state holding that such an action will not lie, except *Van Arnum v. Ayers*, 67 Barb. 544. That case was decided at Special Term in 1877, and the learned justice who wrote the opinion therein, as a member of the General Term when the case now under consideration was affirmed, concurred in the result, and stated that, owing to recent authorities, he thought the right of action should be upheld. Some of the cases rest mainly upon the statute already alluded to, and sustain the action upon the theory that enticing

away the wife is such an injury to the personal rights of the husband as to amount to an injury to the person, while others proceed upon the ground that the loss of *consortium* is an injury to property in the broad sense of that word, "which includes things not tangible or visible, and applies to whatever is exclusively one's own." *Jaynes v. Jaynes*, *supra*, sustains the action upon either ground, although prominence is given to the latter. Several of the cases justify the action generally without allusion to any statute. If the wrong in question is an injury to property simply, it would not abate upon the death of the plaintiff, but could be revived in the name of the personal representatives, a consequence which suggests the precarious nature of that basis for the action. *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192; 83 id. 595.

In other states the rule varies. In Ohio and Kansas recovery by the wife is permitted, while in Indiana the right thus far has been denied, but by a court so evenly divided in opinion as to leave the ultimate rule in that state uncertain. *Clark v. Harlan*, 1 Cin. 418; *Westlake v. Westlake*, 34 Ohio St. 621; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Logan v. Logan*, 77 Ind. 558. In England the point does not appear to have been directly passed upon, but in one case the judges approached it so nearly and differed so widely in their discussions that it is cited as an authority upon both sides of the question. *Lynch v. Knight*, 9 H. L. 577. The lord chancellor (Campbell) in delivering the leading opinion, said: "If it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone." LORD CRANWORTH was strongly inclined to think that this view was correct, but did not feel called upon to express a decided opinion, as it was agreed that the judgment of the court should be placed upon another ground. LORDS BROUGHAM and WENSLEYDALE thought that the action would not lie. In that case, it is to be observed, the husband joined the wife in bringing the action "for conformity," as there was no enabling statute authorizing her to sue in her own name.

While this action was tried, decided at the General Term and argued in this court upon the theory that the acts of 1860 and 1862, concerning the rights and liabilities of husband and wife were still in force, in fact they have no application, because the sections heretofore regarded as applicable were repealed by the general repealing act of 1880. (Laws of 1880, chap. 245, §§ 36, 38.)

The judgment in this action, therefore, cannot be affirmed upon the ground that the wrong complained of may be redressed under those statutes. Can it be sustained upon the theory that the right of action belongs to the wife according to the general principles of the common law and that she may now maintain it, being permitted to sue in her

own name? The Code of Civil Procedure (§ 450), provides that a married woman "appears, prosecutes or defends, in an action or special proceeding, alone or joined with other parties as if she were single." The capacity of the plaintiff to sue cannot be questioned under this statute, but whether she has a cause of action to sue upon is the important inquiry. Can she maintain an action for any personal injury, even for assault and battery, since the repealing act, already cited, went into effect? Admitting her power to assert her rights in court, what right has she to assert? Has she such a legal right to the conjugal society of her husband as to enable her to recover against one who wrongfully deprives her of that right?

It is urged that the novelty of the action is a strong argument that it cannot be upheld. The same point was urged in almost the first action brought by a husband, against one who had enticed away his wife, and the answer made by the court in that we repeat as applicable to this: "The first general objection is that there is no precedent of any such action as this, and that, therefore, it will not lie. But this general rule is not applicable to the present case. It would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore v. Greenbank*, Willes, 577, 580.

Moreover, the absence of strictly common-law precedents is not surprising, because the wife could not bring an action alone, owing to the disability caused by coverture, and the husband would not be apt to sue, as by that act he would confess that he had done wrong in leaving his wife.

The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What

reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? Does not the principle that "the law will never suffer an injury and a damage without a remedy" apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?

It appears from the cases already cited that, according to the weight of authority, the wife can maintain such an action when there is a statute enabling her to sue. The modern elementary writers take the same position. "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of *consortium* of the wife or husband, under which term are usually included the person's affection, society or aid." Bigelow on Torts, 153. "We see no reason why such an action cannot be supported where, by statute, the wife is allowed to sue for personal wrongs suffered by her." (Cooley on Torts, 227.)

The question remains whether a married woman can now maintain an action in this state for an injury to her person? Had a married woman a right of action at common law for a personal injury, but without power to assert it, owing to her coverture, or did the right itself belong to the husband? If the right was his, she seems to have no remedy for such wrongs since the repeal of the statutes of 1860 and 1862. If, however, the right was hers but, owing to the legal fiction of the unity of husband and wife, she could not assert it, she may now have a remedy under section 450 of the Code.

At common law the husband and the wife were treated as one person, and marriage operated as a suspension, in most respects, of the legal existence of the latter. From this supposed unity of husband and wife sprang all disabilities of married women. She could not make a binding contract or commence an action, because either would imply that she had a separate existence. He could not enter into a covenant with her, because it would be only a covenant with himself. They could not give evidence for each other, because no one was then permitted to testify in his own behalf, nor against each other, because no one could be compelled to accuse himself. But marriage only suspended her personal rights, it did not annihilate them nor transfer them all absolutely to her husband. While it was an absolute gift to him of her goods and chattels, it was only a qualified gift to him of her choses in action, depending upon the condition that he reduce them to possession during coverture,

as otherwise upon his death they belonged to her. *Bright's Husband and Wife*, vol. 1, pp. 34, 36; *Clancy on Woman*, 109; *Reeve's Domestic Relations* (4th ed.), 1; 2 *Kent's Com.* (11th ed.) 116.

"It is common doctrine upon which the decisions in all the states of our Union and of England are in harmony, that, on the death of the husband, the wife's choses in action, not reduced by him to possession, survive to her. She takes them, not as his heir, personal representative or administratrix, but they revert to her in her own right. And we have seen that this doctrine applies as well to the wife's post-nuptial choses in action as to her ante-nuptial ones." *Bishop's Married Women*, § 171. "The husband shall not have them unless he and his wife recover them." *Co. on Lit.* 351, b.

Under the head of choses in action, torts committed upon a married woman, either before or during coverture, are included. "Although the husband is . . . entitled to all the property which the wife acquires during the coverture, yet, if damages be claimed for an injury to her person or reputation during her coverture, those damages belong to her, and she must be joined with the husband in the suit. When damages for such an injury are collected they belong to the husband, but in case of his death before they are reduced to possession they survive to the wife, in the same manner as if the injury had been received before marriage." *Reeve's Dom. Rel.* 87.

"The wife has capacity to be a recipient of wrong as well as of property, the same as though she were sole. If she is slandered, or an assault and battery is committed upon her, or any trespass or other actionable wrong, she may, on becoming discover, sue the wrong-doer the same as though she had been sole when she received the injury; though if the suit is brought in the lifetime of her husband, he must be made a party plaintiff with her, in consequence of the general rule of law which places the wife under the protection of her husband. When the result of the wrong becomes money, in the form of damages paid by the wrong-doer, the wife, though she can receive, cannot hold it, and the title glides to the husband, making the money his." *Bishop on Mar. Wom.*, § 705. The authorities are uniform in supporting the position of these writers. *Latourette v. Williams*, 1 Barb. 9; *Klein v. Hentz*, 2 Duer, 633; *Ball v. Bullard*, 52 Barb. 142; *Beach v. Ranney*, 2 Hill, 309; *Smith v. Scudder*, 11 S. & R. 325; *Checchi v. Powell*, 6 Barn. & Cress. 253; *Bond v. Simmons*, 3 Atk. 20.

The cause of action for a personal injury to a married woman, whether committed before or after marriage, belonged to her at common law, or else it would not survive to her upon the death of her husband. If it was his it would either abate or pass to his personal representatives. On the other hand, if she dies, as LORD BACON said: "The action dies with her." *Bacon's Abr.*, Baron and Feme. K. Unless the right was

hers, subject only to the disability to sue without her husband, why should it cease upon her death? Why should it not survive to the husband if the right itself was his? So in the case of an absolute divorce such rights of action remain the property of the wife. *Legg v. Legg*, 8 Mass. 99; *Lodge v. Hamilton*, 2 S. & R. 491. If the injury was to the wife only, the action was brought in the name of both husband and wife, and was, in effect, her action. If the injury was in part to her and in part to him, for the former both joined, but for the latter he sued alone. *Johnson v. Dicken*, 25 Mo. 580; *Hooper v. Haskell*, 56 Me. 251; *Laughlin v. Eaton*, 54 id. 156.

It is clear, therefore, that at common law the right of action for a tort committed upon a married woman belonged to her, and it is in the light of this principle that the full significance of section 450 of the Code becomes apparent. This section recognizes the separate existence of the wife to the broad extent of authorizing her to sue generally in her own name. By enabling her to prosecute as if she were single, it removed the only obstacle in the way of a personal assertion of her right in this regard. She had a right of action for any actionable injury before, but she could not set the law in motion unless her husband joined. When the legislature provided that she could sue in her own name, without this inconvenient formality, it cut off the right of the husband, and permitted her to prosecute and recover for herself.

This view is confirmed by considering the history of legislation in relation to married women since 1848. Did the legislature suppose that, in repealing the sections in question of the acts of 1860 and 1862, they were restoring the rule of the common law and were depriving married women of substantial rights? (Endlich's Interpretation of Statutes, § 475.)

Every step in legislation, unless this is an exception, has been in the direction of the complete abrogation of the common-law unity of husband and wife. No step backward has been taken in that regard, unless this must be construed to be such.

The bar, the public and the courts have thus far all proceeded upon the theory that a married woman can still sue in her own name and for her own benefit for any injury to her person. It is a matter of common knowledge that, since the repealing act of 1880, in nearly every county of the state such actions have repeatedly been brought and tried, recoveries had and paid, and other actions brought that are now pending, upon the theory, adopted by both parties, that the right of a married woman to sue for personal injuries still exists. Even the exhaustive brief of the learned counsel for the appellant contains no suggestions to the contrary. This practical construction by the bar, the public, the legislature and the courts is of great value, because a contemporaneous is generally the best construction of a statute. Sedgwick on Stat. and Con. Law, 227.

The disastrous consequences that would result from the opposite construction cannot be lost sight of, because for nearly nine years the people have conducted their business, the lawyers have advised their clients and the courts have administered justice without exception, so far as known, in unquestioned reliance upon the unchanged rights of married women, with reference to torts committed upon them. If such a radical change was effected by the repealing act, why was it not sooner discovered? By section 1906 of the Code of Civil Procedure an action for slander by the use of words imputing unchastity can be maintained by a woman without proof of special damage, and "if the plaintiff is married, the damages recovered are her separate property."

Was this section left simply as a landmark to show how far the tide of legislation had gone in the direction of emancipating married women before it began to flow back toward the old level of the common law? Is it not rather part of a harmonious system designed to permit married women to seek redress in their own names and for their own benefit, for any violation of their rights, whether of person or property? According to the Code of Procedure, when a married woman was a party, her husband was a necessary party with her, unless the action concerned her separate property, or it was between herself and husband. Code Pro., § 114; Laws of 1849, chap. 438, § 114. It was not by virtue of that Code, but owing to the acts of 1860 and 1862, that a married woman could sue for personal injuries.

From 1849 until 1877, section 114 of the old Code remained unchanged in this respect. When section 450 of the new Code was enacted it was a substitute for section 114, and the revisers, in reporting the new section said: "It is believed that no argument is necessary in support of the proposition that what is left of that section by the various married women's acts should be swept away."

The object of the repealing act of 1880, as well as that of its precursor of 1877, as is evident from an attentive study of their provisions, was to do away with statutes and parts of statutes regarded as obsolete. Laws of 1877, chap. 417; Laws of 1880, chap. 245.

Owing to the enactment of the Code of Civil Procedure and other statutes revising and changing existing laws without repealing or referring to them, the legislature sought to repeal statutes and sections no longer regarded as operative. Its intention was to formally do away with that which had already been practically done away with, rather than to make further changes. If the legislature had intended to make a radical alteration in its long established policy of legislation affecting the rights of married women, it would not ordinarily be buried in the midst of an act designed to erase useless provisions from the statute book. One would not expect that such a decided change, affecting nearly every family in the state, would be so obscurely made.

These views are not in conflict with *Fitzgerald v. Quann*, 109 N. Y. 441, which holds that in an action against the wife for a tort committed by her, as the husband is still liable, he is a proper party defendant.

At common law the husband was liable for the torts of his wife, whereas her choses in action, including the right to recover for torts inflicted upon her, never vested in him, although he was entitled to the proceeds when collected. As a party plaintiff, therefore, he was joined "for conformity," but it was "more than a mere necessity to join him as a party defendant." *Fitzgerald v. Quann*, 33 Hun, 657, 658. His joinder in the one case was a mere formality, while in the other it was on account of his liability. While he had no cause of action in the former, there was a cause of action against him in the latter.

We regard the language of section 450, when construed in connection with the common-law rules already alluded to, as strong enough to relieve a married woman of the formality of having her husband unite with her in bringing an action for an injury inflicted upon her, but not strong enough to relieve him of his absolute liability.

We think the judgment appealed from should be affirmed upon the ground that the common law gave the plaintiff a right of action, and that the Code gave her an appropriate remedy.

All concur except HAIGHT and PARKER, JJ., dissenting, and FOLLETT, CH. J., not sitting.

*Judgment affirmed.*¹

LOSS OF SERVICE AND OF CONSORTIUM DISTINGUISHED.

CREGIN v. BROOKLYN CROSSTOWN R. R. Co.

(75 New York, 192.—1878.)

APPEAL from an order of the General Term of the City Court of Brooklyn, affirming an order of Special Term continuing this action in the name of Thomas Cregin as administrator of the plaintiff, he having died pending the action.

This action was brought by plaintiff to recover for the loss of the services and society of his wife, and for expenses of medical attendance, etc., the complaint alleging, in substance, that defendant received the wife of the plaintiff, upon one of its cars as a passenger, that she paid her fare and that through the negligence of defendant and its servants she was thrown down and seriously injured.

¹ Concurring opinion by BRADLEY, J., omitted.

RAPALLO, J. We think the appellant is correct in the position that this is an action grounded in tort. The complaint alleges that the defendant received plaintiff's wife in one of its cars as a passenger; that she paid her fare, and while she was such passenger she was thrown down and injured by the negligence of the defendant. No contract with the plaintiff is alleged, and the *gravamen* of the complaint is the wrongful injury to the person of his wife.

The cause of action is therefore one which at common law would have abated by the death of the plaintiff, and the only point to be considered is whether under the provisions of 2 Revised Statutes, 447, sections 1 and 2, it survives.

Section 1 preserves from abatement by death, actions "for wrongs done to the property, rights, or interests of another." This language is very broad and embraces a large class of actions. It is not confined to direct injuries to property, but includes all injuries to the rights or interests of a deceased party, except such as are enumerated and exempted in the following section: No. 2. These are, actions for slander, libel, assault and battery, false imprisonment, and actions on the case for injuries to the person of *the plaintiff*. These exceptions necessarily prevent the surviving of any action for slander, libel, assault and battery or false imprisonment, or for any injury to the person of any deceased plaintiff, however seriously such injury may have affected his property or estate. But they do not cover an action for a wrong done to his rights or interests, even though this wrong may have been effected by means of an injury to the person, provided the injury was not to the person of the plaintiff, but of some other party.

The rights and interests, for tortious injuries to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished. The exceptions in the statute are such as scarcely to leave any conceivable action for injuries to other rights uncovered by them. But where an injury to pecuniary interests is shown, the intent of the statute seems plain that the cause of action shall survive, notwithstanding that such injury be caused by a tort, provided it be not one of the torts specifically mentioned and excepted in section 2. All pecuniary injuries (not resulting from the enumerated and excepted causes, such as assault and battery, slander, etc.), are placed upon the same footing when occasioned by a tort, as if arising from breach of contract, and such is the language of the statute. It declares that for wrongs done to the rights or interests of another (except the specified wrongs) the cause of action shall survive in the same manner and with the like effect in all respects as actions founded upon contracts. In *Haight v. Haight*, 19 N. Y. 464, 468, it is said by GROVER, J., that the exceptions contained in the second

section manifest the intention of the Legislature that all other actions founded upon torts should survive. And in the same case at page 474, DENIO, J., says that the action (which was for false representations), was for a "wrong done" to "the rights and interests" of the plaintiffs, and the exception in section 2 shows, if there was otherwise any doubt, that the prior section was intended to embrace this case.

The wrong done in the present case is alleged in the complaint to have been a wrongful injury to the person of the plaintiff's wife, whereby she was rendered permanently unable to attend to her household and other duties and the plaintiff was obliged to expend sums of money in procuring medicines and necessaries and employing physicians to treat her for her injuries, and that he had been and would be permanently deprived of her services and comforts.

This we think was a wrong done to the rights and interests of the husband. He had a right to the services of his wife, they were of pecuniary value to him, and any wrong, by which he was deprived of those services, or put to expense to remedy or palliate the consequences of the injury to his wife, was a wrong done to his rights and interests. Adopting the construction that pecuniary rights and interests only are protected by the statute, these were plainly involved, and if the pleader had left out the word "comforts," the complaint would have disclosed an injury to pecuniary interests exclusively. We do not think that because in addition to the injury to these interests, the personal comfort of the plaintiff was interfered with, that circumstance should deprive his representatives of their remedy for the pecuniary injuries which he sustained, and which diminished his estate, nor do we think that it can be laid down as a rule of universal application to all classes of society that in such a case the injury to the personal feelings and comfort of the husband is the *gravamen* of the wrong and the pecuniary injury a mere incident, of which the law will not take notice independently of the former.

Where an injury is done to the person of *the plaintiff* the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single, and consists of the injury to the person; the damages are the consequence merely of that injury and where by the terms of the statute such a cause of action abates, the character of the damages cannot save it. But where the cause of action is not one of those enumerated in the statute, the character of the damages may control the question whether there is an injury to the property, rights, or interests of the plaintiff.

The case of *Wade v. Kalbfleisch*, 58 N. Y. 282, does not conflict with these views. The question of law involved in that case was whether the action was on contract, or for a personal injury. The majority of the court held that it was an action for a personal injury, and that al-

though pecuniary interests might be incidentally involved, the injury to them did not constitute the cause of action. This clearly appears from the prevailing opinion of CHURCH, CH. J., who says at page 287, that the action (breach of promise of marriage) was *sui generis*; that the form of action was not material. That the controlling consideration was that it did not relate to property interests, but to personal injuries. Granting that it was not an action on contract, but was one for personal injuries, the conclusion necessarily followed. The injuries were to the person of the plaintiff, and the case was within the very letter of the exception contained in section 2 of the statute. Even though it was a tort affecting the rights and interests of the plaintiff, if it was an injury to her person it could not survive. The present action was for a tort which affected injuriously the rights and pecuniary interests of the plaintiff. It was therefore for a wrong done to those rights and interests, and is covered by section 1 of the statute. The cause of action was not an injury to his person nor any of the others enumerated in section 2, and is not within the exception. It must therefore be held to survive with like effect as if the action were on contract.

The order should be affirmed, with costs.

All concur, except MILLER and EARL, JJ., absent at argument.

*Order affirmed.*¹

LOSS OF SERVICE BY ASSAULT AND BATTERY.

COWDEN V. WRIGHT.

(24 Wendell, 429.—1840.)

WRIGHT sued Cowden in an action of trespass for assaulting and beating her son, *per quod servitium amisit*. Cowden was the teacher of a select school, and the plaintiff's son was one of his scholars, and the beating complained of was by way of punishment for disorderly conduct. The court, among other things, charged the jury that in making up their verdict they might take into the account *the feelings of the parents* occasioned by the infliction of the punishment of their son. To which the defendant excepted. The jury found a verdict for the plaintiff with \$75 damages. Judgment having been entered on the verdict, the defendant sued out a writ of error.

¹ See Erwin's Summary of Torts, 2d ed., pp. 37-44; and pp. 99-100.

By the Court, NELSON, CH. J. I think the court erred. The foundation of the action is the loss of service and the expense and trouble the parent is subjected to in taking care of his child.

It is true that, in the action for the seduction of a daughter, the jury in fixing upon the damages may regard the wounded feelings of the family; but that case has always been considered *sui generis*, and inconsistent with the fundamental principle of the action. Besides, there is a marked distinction between that and the present case. There the only remedy for the injury is the action by the parent; the daughter is without redress, however, aggravated the seduction. It is not therefore surprising the courts should have been indulgent in the measure of damages in the particular case. But here the child may also maintain an action against the defendant, in which the measure of redress depends very much upon the sound discretion of the jury, because his personal injury and suffering then constitute the gravamen of the suit. Full opportunity is here afforded to inflict upon the wrongdoer punishment in proportion to the aggravation of the assault. The two remedies, one in behalf of the parent, the other of the child, seem to me sufficiently liberal, when taken together, upon the principles above stated; certainly as much so, and more onerous to the defendant, as in the case of the injured party, where the remedy is confined to one action for the assault.

Edmondson v. Machell, 2 T. R. 4, may, I think, be regarded as countenancing the view we have taken. Trespass for assaulting and beating the plaintiff's niece, *per quod*, etc., was brought by the aunt, and at the same time another action was brought by the niece for the same assault. The counsel for the aunt, on the trial, withdrew the record in the latter case, and declared their intention not to try it. The defendant insisted that the jury could only give damages for the loss of service; the court ruled otherwise, and placed the case on a footing with the action for seduction. On a motion for a new trial, it was admitted the damages were not excessive, if the jury had a right to take both actions into their consideration; and the court, on the niece stipulating not to proceed in her action, refused to grant a new trial. But it is obvious, from the report of the case, the result would have been different without this stipulation; in effect, I think, denying the analogy to the suit for seduction.

Judgment reversed; *venire de novo*; costs to abide event.

SAME: BY DEFAMATION.**GARRISON V. SUN, ETC., ASSOCIATION.**

(207 New York, 1.—1912.)

APPEAL by permission from a judgment of the appellate division, affirming an interlocutory judgment of the Special Term, which overruled a demurrer to one of the causes of action in plaintiff's complaint.

HISCOCK, J. By demurrer to one of the purported causes of action set forth in the complaint the question is presented whether a husband may recover for loss of services of his wife caused by her sickness resulting from mental distress, which in turn was caused by the defendant's willful and malicious publication concerning her of defamatory words actionable *per se*. Whatever facts may be established on a trial, we must assume for the purposes of this appeal, in accordance with defendant's admissions concededly to be implied from its demurrer, that the defendant not only published of and concerning plaintiff's wife the actionable words complained of, but that it did so "wickedly and maliciously and intentionally and willfully," for thus it is alleged in the complaint.

Inasmuch as plaintiff's right to recover, if at all, under the circumstances must in effect be derived through his wife, it will be important in the first place to inquire whether the wife herself might recover for mental distress and physical sufferings resulting from the willful and malicious publication of such libelous words.

It was early established in this State by decisions which do not appear to have been overruled or limited that an action to recover for the utterance of defamatory words, not actionable in themselves, could not be sustained by proof of mental distress and physical pain suffered by the complainant as a result thereof (*Terwilliger v. Wands*, 17 N. Y. 54; *Wilson v. Goit*, 17 N. Y. 442). And the same doctrine seems to have prevailed in England (*Alsop v. Alsop*, 5 H. & N. 534, 539; *Lynch v. Knight*, 9 H. of L. cases, 577, 592).

On a superficial examination of the opinion in *Terwilliger v. Wands*, and on which rested the decision in *Wilson v. Goit*, it would seem to be founded on reasons which would be as applicable to a case of defamatory words actionable in themselves as to one where the words were not thus in themselves actionable and required proof of special damages. It was held that special damages of the kind stated and of which recovery was there being sought were not such natural, immediate and legal consequences of the words spoken as to sustain the action. A more

careful examination, however, discloses that the real and full theory on which a recovery was refused was that an action for slander or libel is brought to recover fundamentally for injury to character and that the special damages necessary to sustain such an action must flow from disparaging and injuring it; that illness "was not in a legal view a natural, ordinary one (consequence), as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon anyone unfavorable to the plaintiff." It was further remarked that "this element of an action for slander in a case of words not actionable of themselves, that the special damages must flow from impaired reputation, had been overlooked in several cases, but that nevertheless, "where there is *no proof that the character has suffered* from the words, if sickness results it must be attributed to apprehension of loss of character, and such fear of harm to character, with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action. The loss of character must be a substantive loss, one which has actually taken place" (pp. 62-63).

Both the *Terwilliger* and the *Wilson* cases took pains to limit their effect to cases of defamatory words not actionable in themselves. Their plain intent was to declare that an action of libel or slander involves as its very foundation an injury to character; that where the language complained of is not of such a character that the law presumes an injury, but requires proof of special damages, this requirement cannot be satisfied by simply proving that the plaintiff had been made sick, there being no proof whatever of injury to the character, which involves the effect of the defamatory words on third persons rather than on himself (*Hamilton v. Eno*, 16 Hun, 599, 601).

It will be seen that this reasoning does not apply to a case where the words are actionable in themselves, because there the law presumes an injury to character which of itself will sustain an action, and proof of mental or physical suffering is presented as an element of additional or special damages accompanying or resulting from the injury to character thus presumed. Expressions are to be found in some of the decisions of this court which might seem to suggest the conclusion that proof of such suffering is allowed only as a basis for punitive and not as a basis for compensatory damages. (*Brooks v. Harrison*, 91 N. Y. 83, 91; *Warner v. Press Pub. Co.*, 132 N. Y. 181.)

But if these or other cases left any doubt of the right of a plaintiff in an action for the utterance of defamatory words actionable *per se* to recover compensatory damages for mental distress, this doubt was dispelled and such right fully established by the case of *Van Ingen v. Star Co.* (1 App. Div. 429, aff'd 157 N. Y. 695, on the opinion of Mr. Justice INGRAHAM in the Appellate Division). While the opinion touches

briefly on this question of the right thus to recover in such a case for mental sufferings, the printed record shows that the question was fairly and plainly involved and presented, and that the decision must be regarded as an adjudication of this question (see also as supporting such conclusion *Aaron v. Ward*, 203 N. Y. 351, 354; *Ransom v. N. Y. & Erie R. R.*, 15 N. Y. 415, 420; *Burt v. McBain*, 29 Mich. 260; *Markham v. Russell*, 12 Allen, 573, 575; *Swift v. Dickerman*, 31 Conn. 285; *Childers v. Mercury, &c., Co.*, 105 Cal. 284, 289; *Lehrer v. Elmore*, 100 Ky. 56, 60; *Finger v. Pollack*, 188 Mass. 208; *Adams v. Smith*, 58 Ill. 417, 421).

While the further proposition does not appear to have been specifically decided in this State, I have no doubt that a plaintiff being entitled to recover compensatory damages for mental distress resulting from the publication of defamatory words actionable in themselves may likewise recover for physical sufferings brought about by or attending such mental distress. It is true that the physical sufferings, as in this case, may be removed one step further from the wrong than the mental disturbance which gives rise to it, but this fact of itself does not prevent a recovery provided these damages otherwise come within the rules applicable to such a subject.

The general rule in torts applied to such actions as those of negligence is that a wrongdoer is responsible for the natural and proximate consequences of his conduct, and what are such consequences must be generally left for the determination of the jury (*Ehrgott v. Mayor, &c., of N. Y.*, 96 N. Y. 264, 282; *Milwaukee & St. P. Ry. v. Kellogg*, 94 U. S. 469).

The essential requirements in such cases are that the damages shall be directly traceable to the wrongful act and not the consequence of some intervening outside cause, and that they shall be the natural results thereof. Under this rule it has been held in this State, as in others, that in an action for negligence a plaintiff may not recover for physical sufferings, as a miscarriage resulting purely from fright, where there was no physical injury; that to allow a recovery in such a case would be to recognize damages which were not natural and ordinary (*Mitchell v. Rochester Ry.*, 151 N. Y. 107, 110; *Hack v. Dady*, 134 App. Div. 253). While there can be no question under the admitted allegations of the complaint that the wife's sickness in this case was directly connected with defendant's wrongful act by an unbroken chain of cause and effect, it is urged under decisions of the class last referred to that such physical sufferings resulting from mental distress are too remote and unusual to become a subject for compensation.

I think the rule of these cases is not here applicable for two reasons. In the first place it might well be said that substantial physical sufferings resulting from mere mental action are not a natural result of negligent conduct which generally makes itself felt by inflicting some ac-

tual direct physical injury. In the case of such a wrong as that of libel and slander, however, the natural and immediate effect in the line of results we are now discussing must be on the mind and not on the body, and therefore such mental disturbance and its consequences even in the shape of resulting sickness are fairly to be apprehended.

But in the second place I think the rule must be regarded as well recognized that in an action brought for the redress of a wrong intentionally, willfully and maliciously committed, the wrongdoer will be held responsible for the injuries which he has directly caused, even though they lie beyond the limit of natural and apprehended results as established in cases where the injury was unintentional (*Eten v. Luyster*, 60 N. Y. 252, 260; *Williams v. Underhill*, 63 App. Div. 223, 226; *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 108, 119; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 475; *Spade v. Lynn, &c., R. R. Co.*, 168 Mass. 285, 295; *Lehrer v. Elmore*, 100 Ky. 56, 60; *Meagher v. Driscoll*, 99 Mass. 281; *Swift v. Dickinson*, 31 Conn. 285).

In *Spade v. Lynn, &c., R. R.* (*supra*), the court, after affirming the rule that in an action for negligence there could be no recovery for physical sufferings resulting from mere fright and mental disturbance, said: "It is hardly necessary to add that this decision does not reach those classes of action where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to be inferred, as, for example, in cases of . . . slander."

In *Burt v. McBain* (*supra*), which was an action to recover damages for the utterance of words similar to those alleged in this case, and, like the latter, made actionable *per se* by statute, it was held that injury to mind and health were such natural results of such an utterance that they may be shown as an element of damages without even a special declaration of it.

In *Swift v. Dickinson* (*supra*), it was held that a plaintiff might recover damages for physical sufferings caused by the utterance of words actionable *per se*.

In the *Terwilliger* and *Wilson* cases, already quoted from, it is fairly to be inferred from the pains with which those decisions were limited to cases of words not actionable *per se* that a different rule would apply and a recovery be allowed for physical sufferings and mental distress resulting from the defamatory utterances of words actionable in themselves.

In the foregoing discussion, of course, there has not been overlooked the case of *Butler v. Hoboken, &c., Co.* (73 N. J. Law, 45), in which the conclusion is reached that such damages as are here asked for may not be recovered or the expressions of similar views by some text-writers, and which so far as they are based on any direct authority rest on the *Butler* case.

The *Butler* case cites no direct authority for the decision there made. It cites the *Van Ingen* case, referred to herein, as authority for the proposition that in New York only punitive and not compensatory damages may be allowed for mental sufferings in case of defamatory words actionable *per se*. It relies on the entire absence of any precedent for the allowance of damages for physical sufferings in cases of defamatory words actionable *per se*, and reaches the conclusion that such damages are too remote to be allowed.

As I have shown, the *Van Ingen* case expressly holds that compensatory damages may be allowed in the cases stated for mental suffering, and I have called attention to authorities directly holding that damages for physical sufferings may be allowed in cases of defamatory words actionable *per se*, and to other authorities holding that a more liberal rule in the allowance of damages prevails where the injurious wrong complained of has been the result of willful, malicious intent than where it has been the result of mere unintentional negligence.

If I have correctly analyzed these authorities and the principles affirmed by them, they destroy the basis for the conclusions which were reached in the *Butler* case and the force of that decision as an authority in this case.

Reaching the conclusion as I, therefore, do, that the wife might have recovered damages for the mental distress and physical sufferings caused by the publication of defendant's libel, it follows that plaintiff as her husband may maintain this action for loss of society and services. He had a right to these. The services were presumably of pecuniary value to him, and any wrong by which he was deprived thereof was a wrong done to his rights and interests for which he may recover damages. (*Cregin v. B'klyn Crosstown R. R.*, 75 N. Y. 192; *Reynolds v. Robinson*, 64 N. Y. 589; *Wilson v. Goit*, cited *supra*; *Olmsted v. Brown*, 12 Barb. 657.)

In the *Wilson* case it was assumed that the right of a husband to recover in such a case as this was tested by the right of a wife to recover the damages accruing to her personally for the injuries which caused the loss of services to her husband. In the *Olmsted* case the general principle was affirmed that a husband might recover for loss of services resulting from sickness of the wife caused by slander, recovery there being refused on other grounds. That seems to be the logical and reasonable rule. If the defendant was guilty of wrongful conduct, which made it liable to the wife for personal sufferings, it also should be liable to the plaintiff for the loss of his wife's services caused by the same act.

In accordance with these views I recommend that the judgment appealed from be affirmed, with costs, and the question certified to us answered in the affirmative.

CULLEN, CH. J., HAIGHT, VANN, CHASE and COLLIN, JJ., concur;
WILLARD BARTLETT, J., not sitting. *Judgment affirmed.*

SAME BY NEGLIGENCE.

CUMMING v. BROOKLYN CITY R. R. Co.

(109 New York, 95.—1888.)

ACTION by Isabella Cumming to recover for loss of services resulting from injuries inflicted on her daughter Bessie I. Cumming, by the Brooklyn City Railroad Company, defendant. Judgment for plaintiff, affirmed by the general term, and defendant appeals.

ANDREWS, J. It seems to be the doctrine of the law of England that the right of a parent to maintain an action for an injury to his minor child, from the tortious act of a third person, is founded exclusively upon the loss of service, and that the parent has no remedy even for expenses incurred, unless the child is old enough to be capable of rendering some act of service, and the relation of master and servant, express or implied, exists between them. *Grinnell v. Wells*, 7 Man. & G. 1041; 2 Add. Torts, § 902. But when the action is maintainable on the ground of loss of service, then, both by the law of England and of this country, the parent may claim indemnity, not only for the actual loss of service to the time of the trial, but also for any loss of service during the child's minority, which, in the judgment of the jury, and according to the evidence, will be sustained in the future, and for expenses necessarily incurred by the parent in the cure and care of the child in consequence of the injury. *Cowden v. Wright*, 24 Wend. 429; *Drew v. Railroad*, 26 N. Y. 49; *Dixon v. Bell*, 1 Starkie, 287; Schouler, Dom. Rel. 351. The English rule which denies to the parent any remedy for medical or other expenses incurred in consequence of the injury to the child, except as incident to the loss of service, ignores the parental relation and obligation as an independent ground of recovery, although it may be manifest that the parent had sustained a pecuniary loss as the proximate result of the wrong. The court of Massachusetts, in the case of *Dennis v. Clark*, 2 Cush. 347, held a more liberal, and, as it seems to us, a more reasonable and equitable doctrine, and decided that when an infant, residing with his father, receives an injury such as would give the child a right of action, the father who is put to necessary expense in the care and cure of the child, may maintain an action for indemnity, although the child was, by reason of his tender age, incapable of rendering any service. This doctrine casts upon the wrong-doer responsibility for a pecuniary loss flowing from his wrongful act, actually sustained by the parent in the discharge of his parental obligation to care for and maintain his infant children. But there is another phase of the question

presented in the present case. The mother, the father being dead, brings her action, founded upon loss of service for an injury to her minor child, and is permitted to recover not only prospective damages for loss of service during the 15 years before the child will reach her majority, but also for surgical expenses which have not been in fact incurred, and the incurring of which is not presently necessary, but which, in the opinion of experts examined on the trial, it will become necessary to incur, in consequence of the injury, at some time during the child's minority. The trial judge, with a view to the ascertainment of this item of damages, permitted a surgeon, against the objection of the defendant, to testify that the expense of an operation, which, in his judgment, would become necessary at some remote period during the child's minority, would be \$300. In other words, the jury were permitted to include, as a part of the damages in the action, the value of contingent and prospective surgical services. The right of the parent, in an action for loss of service of a child disabled by a tortious injury, to recover for prospective loss of service during the child's minority, is well settled. These damages are, however, of necessity to a great extent speculative or conjectural. There are many contingencies which may deprive the parent of the services of a child, and even make the child a pecuniary burden to the parent, although the particular injury had not happened. The child may die from disease or other accident, or the parent may die. The prospective damages for loss of service, recoverable in such a case as this, may never in fact be sustained. But as only one action can be maintained against a wrong-doer for a single wrong, the law, from necessity, permits consequences not yet fully ascertained, but which are reasonably certain to happen, to be anticipated, and a jury is allowed to estimate the damages for future loss of service in the light of experience and of such evidence as can be given. The damages allowed in this case for prospective surgical expenses have still another element of uncertainty. If recoverable by the parent, it must be upon the ground of the parent's obligation to maintain the child. But not only may the parent die or the child die, thereby rendering the surgical expenses unnecessary, but the parent may become wholly unable to pay for the services, if required, or the child may be treated in a hospital, or at public expense, as was in fact the case in this instance, when the child's leg was amputated. There is adequate reason for permitting the parent to recover medical or other expenses actually incurred, consequent upon an injury to the child from the wrongful act of a third person. In case of an injury to a minor child, whose parents are living, there is a double right of action; an action by the child, and an action by the parent. In the child's action, plainly, there can be no recovery for expenses actually incurred by the parent, and so far a double recovery is prevented. But it is not so plain that the child may

not recover, as part of his damages, all the proximate pecuniary consequences of his disability, including medical and other expenses, as under the evidence the jury shall find it will be necessary in the future to incur. The denial of this right would, in many cases, deprive the child of the means of necessary relief. It cannot, I suppose, be doubted that, the parents being dead, all the future consequences of the injury and necessary expenses flowing from the disability would be proper element to be considered by the jury in an action brought by the child, nor is there much doubt that these considerations enter into every verdict rendered in an action brought by a minor for his personal injury. There is perhaps a logical difficulty in denying the right of the parent to recover the damages now in question, but the same difficulty attends a denial of the child's right. It appears by the record that the child has brought an action, and has recovered her damages. In the absence of controlling authority, we are of opinion that in an action by a parent, founded on loss of service of the child, only expenses actually incurred by the parent, for medicine or medical attendance, or which are immediately necessary to be incurred, are recoverable as incident to the main cause of action, and that future, prospective, contingent expenses of this kind are recoverable only in an action by the child. The parent, in an indirect way, is benefited by a recovery by the child, and this rule will be most likely to accomplish justice and prevent a double recovery in such cases. The obligation of parents to maintain and provide for their children has its most effectual sanction in the natural affections. The law, at best, can but imperfectly enforce it. It does not undertake to do so directly until children have become, or are likely to become, a public charge. The law of necessities is so limited and guarded that the wants of children can only be supplied under this rule in exceptional cases. The legal obligation of maintenance and support resting on the mother is especially imperfect. In all cases it necessarily can be enforced only in cases of the pecuniary ability of the parent, and in case of the mother the child's means are first chargeable with his support. *Furman v. Van Sise*, 56 N. Y. 435. A recovery in the child's action for a personal injury, for prospective medical services, where the fund recovered is usually preserved through a guardian, or in other ways, will be most likely to secure such services when needed. Whether, in any view, the attempt to fix a definite sum for contingent expenses which may never be incurred, was not pushing the evidence further than is permissible, need not be considered.

These views lead to a reversal of the judgment.

All concur.

SAME: IN CASE OF INSTANTANEOUS DEATH.**SORENSEN V. BALABAN.**

(11 Appellate Division, 164.—1896.)

ACTION by Ida C. Sorensen against Siegbert Balaban for malpractice and for the maligning of the memory of plaintiff's deceased daughter. From a judgment entered on a verdict in favor of plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals.

CULLEN, J. The plaintiff was the mother of one Clara O. Nelson, now deceased. The deceased was an infant, unmarried, in the service of her mother, her father being dead. The defendant is a physician, and attended said Clara in her last illness. The action is brought on substantially two causes of action. The first charges the defendant with malpractice in his attendance on the patient, by reason of which said Clara died. The second cause of action charges that, after the death of Clara O. Nelson, the defendant maligned her memory by repeating to the plaintiff and to divers other persons a false, untrue, and malicious charge that the said Clara had been pregnant, and had had a miscarriage. The plaintiff recovered a verdict for \$5,000.

It clearly was the rule at common law that no civil action would lie for causing the death of a human being. Cooley, Torts, p. 262. While a husband or parent might maintain an action for a wrong causing loss of services from a wife or child, if the injury resulted in death, this could not, at the common law, be taken into account, either as a ground of action or as an aggravation of damages, and the plaintiff's recovery would be limited to loss of service intermediate the injury and the death. *Id.*, p. 226. The exact question was determined by the court of appeals in *Green v. Railroad Co.*, 2 Abb. Dec. 277. Since the time of that decision I cannot find that there has ever been in this state a contention for the contrary rule. Of course, for many years, the statute has prescribed a remedy for such wrongs. An action for a wrongful act causing the death of any person may be maintained by the executor or administrator of such person for the benefit of his next of kin. Code, § 1902. The plaintiff, however, has not brought this action in such capacity. But, though the trial court erred in assuming that the plaintiff could maintain an action for the death of her daughter, still there was enough in the complaint and in the evidence to show that the daughter was sick for some few days prior to her decease. For loss of services during this period, and the expense of care and attendance during the like time, the

plaintiff was entitled to recover. Therefore, the defendant's motion to dismiss the complaint as to this cause of action was properly denied.

When the cause was submitted to the jury the court charged that the plaintiff could recover for loss of the services of her daughter from her daughter's death to the time she would have arrived at the age of 21 years. The defendant asked the court to charge that the plaintiff could not recover damages for the death of the deceased. The court charged this, "except so far as the plaintiff had lost the daughter's personal services." This qualification was error. The plaintiff could not recover any damages caused by the daughter's death. She could recover, as already stated, for loss of service during the period the daughter was ill; but such damages were damages not resulting from the death, but from the malpractice. I can find no exception to the failure of the court to charge as requested. As the appeal before us is not only from the judgment but also from the order denying defendant's motion for a new trial, it is within our discretion to take notice of the error, though without exception.

This brings us to the question whether the second cause of action stated in the complaint is a good cause of action which the plaintiff can maintain. The action is for damages suffered by a living person from maligning the memory of a deceased relative. No authority for the maintenance of such an action is to be found. As stated by the counsel for the respondent, the lack of precedent is not necessarily conclusive that such an action cannot be sustained, but certainly it militates strongly against the proposition. I think, too, that an analysis of the character of an action for slander will show that, on principle, no such action as the present one can be supported. Mr. Cooley says, of slander and libel (Cooley Torts, p. 103):

"In a legal sense, there is no wrong until the defamatory charge or representation is given to the world. This is done when it is put before one or more third persons. It is then said to be published. To say to a man's face any evil thing concerning him is no defamation; for, though it may be annoying, aggravating, and possibly injurious, to him, in its effect upon his mind and indirectly upon his business, still there is, as yet, no publication, and consequently nothing to affect the party's reputation. The reputation is not assailed, and cannot, presumably, be injured, when the false charge is made to the party himself. If the party who is thus falsely accused repeats it to others, by way of complaint or otherwise, it may then become public; but it is still no slander, because the publication is not made by the defamer."

It will be thus seen that the action of slander is not to redress or punish the indignity or outrage on one's feelings when he is falsely charged with an offense, but to redress his reputation or character with others.

So, in *Wilson v. Goit*, 17 N. Y. 442, it was said:

"We were of opinion that the law gave this action only for an injury to the plaintiff's reputation, and that the pecuniary loss which is required to be shown, where the words are not actionable *per se*, must be the effect of the injurious imputation upon other persons than the party bringing the action. The bodily disability of the party thus slandered, through the effect of the slander upon his mind, was not, as we thought, the natural and legal consequence of such an injury. . . . But an action for slander, which is allowed solely for the vindication of an injured reputation, would plainly be perverted, if used as a means of punishment, where the slanderous words were not actionable in themselves, and were not credited by any individual, and where the plaintiff's character has not suffered in the slightest degree."

So far, therefore, as a false aspersion on her daughter's memory, made to the plaintiff, was an insult and an outrage upon the mother's feelings, it could no more give the plaintiff a right of action than if the defendant had aspersed to the plaintiff her own character. It would seem plain that the imputation on the character of the daughter did not necessarily or naturally affect the reputation or character of the plaintiff. And, as it is only injury to reputation which gives a right of action, it is apparent that the present action in this respect cannot be maintained.

Nor are we wholly wanting in authority on this subject. It is asserted in Newell on Defamation (page 369):

"The fact that an infant has been defamed gives his parents no right of action, unless in some very exceptional case it deprives his parents of services which the infant formerly rendered, in which case an action on the case may lie for the special damage thus wrongfully inflicted, provided it be a natural and probable consequence of the defendant's words."

To the same effect, see Odgers, Sland. & L., p. 406. Of course, there could be no loss of services here, because the infant was already deceased.

The only redress for slander is a civil action. A libel, however, both at common law and under our statute, is a crime; and for it the offender may be prosecuted civilly or criminally. Also, both at common law and by the Penal Code (section 243), a libel upon the memory of the dead is punishable as a crime. Speaking of this rule, Mr. Odgers says:

"The criminal remedy for libel, as it is the earlier, so it is the more extensive, remedy. A libel may be indictable though it be not actionable. Thus, in neither of the above cases [a libel upon a deceased person] would an action lie for the want of a proper plaintiff."

The objection that there could not be a proper plaintiff in a civil action for a libel on a deceased person would seem equally applicable to an action for slander. We are therefore of the opinion that such

an action will not lie. The question is properly raised by the record. The defendant's counsel asked the court to charge that the plaintiff could not recover for maligning the memory of the deceased. This the court refused, and to such refusal the defendant excepted.

The judgment and order appealed from should be reversed, and a new trial granted, costs to abide the event. All concur.¹

¹ The case of *Green v. Hudson River R. R. Co.*, 2 Abb. Ct. App. Dec. 277, decided that an action cannot be maintained by a husband for damages arising from the instantaneous killing of his wife by the negligence of the defendants. Leonard, J., in the course of his opinion (p. 282) says: "The subject was very fully and learnedly considered by Justice Bacon, when this case was before him at special term, in an opinion afterward adopted at the general term on appeal and now reported in 28 Barb. 9."

The reason for the rule, as expressed by Bacon, J., (28 Barb. 9, 21), is as follows: "An action by a husband for the loss of his wife by the careless and negligent act of a third party, can only be sustained where some period intervenes between the time of the injury and the time of dissolution, during which he could be said to have suffered the loss of her service and society, and incurred expense and underwent anxiety and distress on her account. Where death is the concomitant of the collision, and life departs at the instant the shock is received, no action for loss of service can be sustained, because there is no time during her life, when it can be said that the husband has lost the service and society of his wife in consequence of the injury complained of. This may be thought a narrow ground on which to place any right of recovery, but there is no other on which the common law rule can be overcome, which declares that the mere death of a human being cannot be complained of as a civil injury, to be compensated in damages." And the same Justice (p. 15) says: "It would savor somewhat more of judicial knight errantry, than of legal prudence, to attempt to unsettle what has been deemed at rest for more than two hundred and fifty years."

DEFAMATION

SLANDER: ACTIONABLE PER SE.

(a) *IMPUTATION OF CRIME.*¹

BROOKER v. COFFIN.

(5 Johnson, 188.—1809.)

ACTION for slander. Demurrer to plea.

SPENCER, J., delivered the opinion of the court. The first count is for these words, "she is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action without alleging special damages. By the statute (1 R. L. 124), common prostitutes are adjudged disorderly persons, and are liable to commitment by any justice of the peace, upon conviction, to the bridewell or house of correction, to be kept at hard labor for a period not exceeding sixty days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute would be en-

¹ "Different rules have obtained in different States concerning the nature of the offense the false imputation of which is actionable *per se*. In some States it has been laid down that, unless the offense charged is indictable and involves moral turpitude, or unless it is one the punishment of which is infamous, there is no right of action without proof of special damage. . . .

"In other States probably, as in England, it would be enough that the crime was punishable in the first instance by imprisonment. In still other States it is not necessary that the offense should be punishable by imprisonment at all, if the offense is punishable and disgraceful; . . . " Bigelow on Torts, 7th ed., pp. 155-6, and cases cited. See, also, cases cited in note to Ames's Cases on Torts, 3d ed., Vol. I., p. 408.

titled to maintain an action for defamation. Among others, to charge a person with pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged, to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F. 20. There is not, perhaps, so much uncertainty in the law upon any subject, as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they therefore adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

* * * * *

The defendant must, therefore, have judgment.

WEBB V. BEAVAN.

(L. R. 11 Queen's Bench Division, 609.—1883.)

DEMURRER to a statement of claim which alleged that the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I will lock you" (meaning the plaintiff) "up in Gloucester Gaol next week. I know enough to put you" (meaning the plaintiff) "there," meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences. The plaintiff claimed £500 damages.

Demurrer, on the ground that the statement of claim did not allege circumstances showing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed. Joinder in demurrer.

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression "indictable offence" seems to have crept into the text-books, but I think the passages in Comyns' Digest are conclusive to show that words which impute any criminal offence are actionable *per se*. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are

not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offence. A great number of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander.

Demurrer overruled.

(b) *IMPUTATION OF LOATHSOME DISEASE.*

JOANNES V. BURT.

(6 Allen, 236.—1863.)

HOAR, J. . . . The declaration is in tort for slander, by orally imputing insanity to the plaintiff. We are aware of no authority for maintaining such an action, without the averment of special damage. The authorities upon which the plaintiff relies are both cases of libel. *King v. Harvey*, 2 B. & C. 257; *Southwick v. Stevens*, 10 Johns. 443. An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders.

* * * * *

Appeal dismissed.

GOLDERMAN V. STEARNS.

(7 Gray, 181.—1856.)

ACTION for slander. The plaintiff alleged that the female defendant accused him of "having had a loathsome venereal disease, and, with that disease upon him, having contracted marriage, and given the disease to his wife," by words spoken of the plaintiff, who was then and there lately married to his wife, substantially as follows: "Golderman has the venereal disease. It is an old affair, and being married has brought it on again. He is the guilty one. He has given it to his wife."

At the trial, plaintiff introduced evidence tending to prove the words and colloquium set forth, and rested his case. Defendants then introduced evidence that immediately after marriage plaintiff had such disease in fact, and claimed that this made out a justification.

Plaintiff then offered to prove that, being a widower, and the father of adult children, he married a woman who had the disease, of which fact he was then ignorant, and, immediately after the marriage, took the disease from his wife, and thereupon sent her away from his house, and had not lived with her since.

The judge ruled, that if the jury were satisfied that plaintiff, at the time of the speaking of the words set forth in the declaration, had the disease in fact, it would be a sufficient justification, and the evidence offered by plaintiff was immaterial. A verdict was taken for defendants. Plaintiff alleged exceptions.

METCALF, J. The charge against the plaintiff of his having the venereal disease is held to be actionable for the same reason that a charge of his having the leprosy or the plague would be; not because the charge imputes any legal or moral offense, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease. Hence it is that to charge one with having had the disease is not actionable; such charge not tending to exclude him from society as a person with whom it is unsafe to associate. *March, Sland.* (Ed. 1674), 77, 78; *Crittall v. Horner*, Hob. 219; *Bloodworth v. Gray*, 8 Scott, N. R. 11; *Carlslake v. Mapledoram*, 2 Term R. 473; 3 Bl. Comm. 123, note by Christian; 2 Dane, Abr. 568.

The jury having found that the plaintiff, when the charge against him was made, had the venereal disease, there remains no ground on which this action can be maintained; for the truth of the charge is a justification.

Doubtless such a charge as the plaintiff complains of may be accompanied with words that necessarily impute adultery or fornication, either of which is an offense punishable by the laws of this commonwealth. In such a case the charge would be actionable. But, in the present case, the words which were added to the charge of the plaintiff's having the disease did not impute any punishable offense. They only asserted that the plaintiff, while a widower, was diseased, and, after his marriage to his present wife, communicated the disease to her. The allegation that he was "the guilty one" means that the disease was communicated by him to her, and not by her to him. It does not import that he contracted the disease guiltily; that is, by committing adultery or fornication. Nor does the plaintiff's declaration aver that any punishable offense is imputed to him by the words spoken.

Judgment on the verdict.

(c) IMPUTATION OF UNFITNESS IN VOCATION.**LUMBY V. ALLDAY.**

(1 Crompton & Jervis, 301.—1831.)

ACTION for words. The first count stated that, before the speaking of the words, the plaintiff was, and hitherto had been, and still was clerk to a certain company, and as such clerk had always behaved himself with great diligence, industry, and propriety, and was acquiring gains and profits; yet, the defendant intending to bring plaintiff into disgrace with said company, and to cause it to be suspected and believed by his neighbors and the said company, that the said plaintiff was of a bad character, and unfit to hold his situation of clerk, and an improper person to be employed by the said company, and to cause him to be deprived of and lose his situation, did in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously speak and publish of and concerning the said plaintiff, these false, scandalous, malicious, and defamatory words: "You (meaning the said plaintiff) are a fellow, a disgrace to the town, unfit to hold your (then and there meaning the said plaintiff's) situation (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas-Light Company) for your conduct with whores. I will have you in the Argus. You (then and there meaning the said plaintiff) have bought up all the copies of the Argus, knowing you (then and there meaning the said plaintiff) have been exposed. You may drown yourself, for you (then and there meaning the said plaintiff) are not fit to live, and are a disgrace to the situation you (then and there meaning the said plaintiff) hold" (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas-Light Company).

Plea, not guilty. The jury found a verdict for the plaintiff. Leave was given to enter a nonsuit.

BAYLEY, B. This case came before the court on a rule *nisi* to enter a nonsuit, the ground of which was, that the words proved on the trial were not actionable.

Two points were discussed upon this rule: one, whether the words were actionable or not; and the other, whether this was properly a ground of nonsuit.

The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas-Light Company, and had behaved himself as such clerk with great propriety, and

thereby acquired, and was daily acquiring, great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words complained of in the declaration.

The objection to maintaining an action on these words is, that it is only on the ground of the plaintiff's being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not from their tenor import that they were spoken with any such reference; and that they do not impute to him the want of any qualification which a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by DE GREY, Ch. J., in *Onslow v. Horne*, 3 Wils. 186, that words are actionable when spoken of one in an office of profit which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and businesses, and do or may probably tend to their damage. The same case occurs in Sir William Blackstone's Reports, 753, where the rule is expressed to be, "if words may be of probable ill consequence to a person in a trade, or profession, or office."

The objection to the rule as expressed in both reports appears to me to be, that the word "probably" or "probable" is too indefinite and loose, and that unless it is considered as equivalent to "*having a natural tendency to*," and are confined within the limits I have expressed in stating the defendant's objection, viz., that of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant.

Every authority I have been able to meet with either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. Immorality only, however gross, is all which is imputed, as here charged. As at present advised, therefore, we are of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply a want of any of those qualifications which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk. . . .

* * * * *

Rule discharged.

IRELAND v. MCGARVISH.

(1 Sandford, 155.—1847.)

ACTION of slander. The declaration stated that plaintiff was the proprietor of a certain garden and house of refreshment and entertainment, whereby he obtained large gains and profits; and that defendant spoke and uttered to one Taggart and to others the following defamatory words of and concerning the plaintiff, and of and concerning his trade and business: "I [the said defendant meaning] am afraid to go to his [the said plaintiff meaning] house alone, [referring to the said plaintiff, and thereby and then and there meaning that the said plaintiff was a dangerous man, whom the said defendant had good cause to be afraid of, and that the said defendant, for the preservation of his life, had to have some one to protect him.]" "I [the said defendant meaning] am afraid of my life, [thereby and then and there meaning that the said plaintiff was seeking his, the said defendant's, life.]" "He [the said plaintiff meaning] is a dangerous man, [thereby and then and there meaning that the said plaintiff was a dangerous and disreputable man, whom he, the said Taggart, and others should shun as unworthy of his esteem, and that the said plaintiff was a man whom it would be dangerous to trust.]" "He [the said plaintiff meaning] is a desperate man, [thereby and then meaning as last aforesaid.]" "Look out, for it is more than likely he [the said plaintiff meaning] will take advantage of you, [thereby and then and there meaning that the said plaintiff was a dishonest and disreputable person, who would take advantage of those who should confide in him, or repose confidence in him, the said plaintiff, and that the said plaintiff was one who should be treated and looked upon as a disreputable man, likely, if an opportunity presented, to cheat and defraud.]" "He [the said plaintiff meaning] is a thief, [thereby and then and there meaning that the said plaintiff had been guilty of a crime of stealing, which rendered him amenable to the laws of the state, as and for a felony.]"

At the trial, a witness for plaintiff testified that plaintiff for six years past owned and kept the Washington House and Gardens at Hoboken. That in the summer of 1845, about the month of June, defendant called at a public house in Elm street, in the city of New York, where witness was employed as bar-keeper, and commenced a conversation about plaintiff. He said he had left plaintiff's employment. He said: "He is a dangerous man." "He is a desperate man." "I am afraid to go to his house alone." "I am afraid of my life." Witness stated, that previous to this, he was in the habit of going to plaintiff's house at Hoboken, with his friends, for refreshments and entertainment, and had

been in such habit for about four years. After this conversation with defendant, the witness did not go to plaintiff's for some time; and made up his mind that he would not go again, until he had seen plaintiff; and it was not until he had called on the witness, and satisfied him of the falsity of the assertions made by defendant, that the witness renewed his visits. Upon this testimony plaintiff rested. A motion was made for a nonsuit, which was granted. Plaintiff moves to set it aside.

VANDERPOEL, J. It cannot be pretended that the words proved to have been spoken by the defendant are actionable *per se*; but it is contended that they convey an imputation affecting the business of the plaintiff, and are therefore actionable. It is a well-established rule that words are actionable which directly tend to the prejudice of any one, in his office, trade, business, or means of getting a livelihood. *Onslow v. Horne*, 3 Wils. 186; *Starkie, Sland. & L.* 180. The words, to be actionable, because they injure one in his business, must have a direct tendency to produce this effect. They must relate to his business character. In *Doyley v. Roberts*, 3 Bing. N. C. 835, it was said of an attorney, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster." The jury found that the words tended to injure the plaintiff morally and professionally, but they also found they were not spoken of him in his business of an attorney, and for that reason the court ordered a nonsuit. TINDAL, C. J., said the words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. So here, though the words were spoken of a man who happened to keep a public garden and house of entertainment, they did not touch or affect him more than they would have touched or affected a person in any other business or profession. In *Southam v. Allen*, 3 Salk. 326, T. Raym. 231, the plaintiff declared that he was a keeper of a livery stable, and of the Bell Savage Inn, and that the defendant had other stables there, and that W. R., coming thither with a wagon, inquired of the defendant which was the Bell Savage Inn, who replied, "This is Bell Savage Inn; deal not with Southam, [the plaintiff], for he is broke, and there is neither entertainment for man or horse." After verdict for the plaintiff, the judgment was affirmed. This was a charge that came directly home to the business of the plaintiff. But to say of a man, "I am afraid to go to his house alone;" "He is a desperate man;" "He is a dangerous man;" "I am afraid of my life,"—is no more calculated directly to affect his business as keeper of a house of entertainment than to prejudice his business as a merchant, a baker, or a blacksmith. All general imputations upon the morality or integrity of men, if believed by those who hear them, may possibly prejudice the business interests of those of whom they are spoken; but the law has not yet been

so prolific of slander suits as to say that such general ebullitions, charging no crime, and pointing to no profession or means of livelihood, shall form the legitimate foundation of an action for defamation. Words, to be actionable, as affecting the plaintiff's business, must charge some delinquency in connection with such business. In the late case of *Van Tassel v. Capron*, 1 Denio, 250, it was expressly held that, where words are actionable only on account of the official or professional character of the plaintiff, it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct to him in that character. As the words here are not actionable in themselves, and do not relate to the business of the plaintiff, the nonsuit was properly granted.

SLANDER: ACTIONABLE UPON PROOF OF SPECIAL DAMAGE

TERWILLIGER V. WANDS.

(17 New York, 54.—1858.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment of the Trial Term dismissing the complaint, in an action for slander charging the plaintiff, a man, with lewd and unchaste conduct. The plaintiff alleged, by way of special damage, that in consequence of the speaking of the words, he had suffered great pain of body and mind, that he became sick and disabled, and unable to attend to his business.

At the close of the evidence, the defendant moved for a nonsuit, upon two grounds, 1st. That the words were not spoken by the defendant to the plaintiff, nor authorized by him to be communicated to the plaintiff; and 2d. That there was no evidence that the damages, if any were proved, were occasioned by the speaking of the words by the defendant. The motion was granted, and the plaintiff excepted and appealed from the judgment entered upon the nonsuit.

STRONG, J. The words spoken by the defendant not being actionable of themselves, it was necessary in order to maintain the action to prove that they occasioned special damages to the plaintiff. The special damages must have been the natural, immediate and legal consequence of the words. Stark. on Sland. by Wend., 2d ed., 203; 2 id. 62, 64; *Beach v. Ranney*, 2 Hill, 309; *Crain v. Petrie*, 6 id. 523; *Kendall v. Stone*, 1 Seld. 14. Where words are spoken to one person and he repeats them to another, in consequence of which the party to whom they

are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition; and the party who repeats them is alone liable for the damages. *Ward v. Weeks*, 7 Bing. 211; *Hastings v. Palmer*, 20 Wend. 225; *Keenholts v. Becker*, 3 Denio, 346; *Stevens v. Hartwell*, 11 Metc. 542. These views dispose of this case as to the right of action in respect to all the words but those spoken to the witness Neiper, as none of them were spoken by the defendant in the presence of the plaintiff, or communicated to the plaintiff by the witnesses to whom they were spoken by the defendant; and there is no proof as to the circumstances under which they were repeated by those witnesses. In the absence of evidence of those circumstances, the general rule, that a repetition of slanderous words is wrongful, applies; hence any damages which resulted from repeating them are a consequence of that wrong, and not a natural, immediate and legal effect of the original speaking of the words by the defendant.

In regard to the words spoken by the defendant to Neiper, it is proved that they were communicated by the latter to the plaintiff, and that Neiper was at the time an intimate friend of the plaintiff. This friendly relation, it is claimed on the part of the plaintiff, rendered the communication of Neiper to him proper; and, being so, it is insisted that the defendant is responsible for the consequences, in the same manner as if the words had been spoken directly to the plaintiff. There are several cases in which it is suggested that circumstances may exist which will justify the repetition of slanderous words, and that when repeated under such circumstances, and damages ensue, the first speaker may be liable in like manner as he would be if the injury had arisen from the words without the repetition. *Ward v. Weeks*, 7 Bing. 211; *Keenholts v. Becker*, 3 Denio, 346; *Olmsted v. Brown*, 12 Barb. 657; *McPherson v. Daniels*, 10 Barn. & Cress. 263. Occasions may doubtless occur where the communication of slanderous words by a person who heard them will be innocent; and it is certainly reasonable that when repeated on such an occasion and damages result, the first speaker should be held responsible for the damages, as flowing directly and naturally from his own wrong. It is not necessary in the present case to decide whether the proposition is law; for, assuming it to be so, and that illness and inability to labor constitute such special damages as will support an action, the evidence in this case wholly fails to show that the damages were a consequence of the words spoken by the defendant to Neiper. The proof is that they were mainly the result of the repetition of the words spoken to the witness Wands, and reports of other persons. It

was not until a considerable time after the plaintiff was informed by Neiper what the defendant had said to the latter that he began to be ill; and his illness commenced immediately after the communication to him of what had been said by La Fayette Wands. At that time the plaintiff had been informed of charges made by Fuller to the same effect, and it is a fair conclusion upon the proof that he then knew what the witness Wands says was the fact, that "the story was all over the country." Under these circumstances it is impossible to conclude that what the defendant stated to Neiper produced the damages. 1 Stark. on Sland. 205; *Vicars v. Wilcocks*, 8 East, 1; *Crain v. Petrie*, 6 Hill, 522.

But there is another ground upon which the judgment must be affirmed. The special damages relied upon are not of such a nature as will support the action. The action for slander is given by the law as a remedy for "injuries affecting a man's reputation or good name by malicious, scandalous and slanderous words, tending to his damage and derogation." 3 Bl. Com. 123; Stark. on Sland. Prelim. Obs. 22-28; 1 id. 17, 18. It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se*, the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. "But with regard to words that do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened." 3 Bl. Com. 124. As to what constitutes special damages, Starkie mentions the loss of a marriage, loss of hospitable, gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers, by a tradesman; and says that in general whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient. 1 Stark. on Sland. 195, 202; Cook's Law of Def. 22-24. In *Olmsted v. Miller*, 1 Wend. 506, it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams v. Hill*, 19 Wend. 305, was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in *Beach v. Ranney*, was the circumstance that persons, who had been in the habit of doing so, refused longer to provide fuel, clothing, etc. 2 Stark. on Ev. 872, 873. These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by, or through, impairing the reputation.

It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily

excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and cannot occasion loss. In Cook's Law of Def. (p. 24), it is said "in order to render the consequence of words spoken special damage, the words must be in themselves disparaging; for if they be innocent the consequence does not follow naturally from the cause." In *Kelly v. Partington*, 5 Barn. & Adolp. 645, which was an action for slander, the words in the declaration were, "She secreted 1s. 6d. under the till, stating these are not times to be robbed." It was alleged as special damage that by reason of the speaking of the words a third person refused to take the plaintiff into service. The plaintiff recovered one shilling damages, and the defendant obtained a rule *nisi* for arresting the judgment on the ground that the words, taken in their grammatical sense, were not disparaging to the plaintiff and therefore that no special damage could result from them. DENMAN, C. J., said: "The words do not of necessity import anything injurious to the plaintiff's character, and we think the judgment must be arrested unless there be something on the face of the declaration from which the court can clearly see that the slanderous matter alleged is injurious to the plaintiff. Where the words are ambiguous, the meaning can be supplied by *innuendo*; but that is not the case here. The rule for arresting the judgment must therefore be made absolute." LITTLEDALE, J., said: "I cannot agree that words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In Comyns' Digest, title, 'Action on the Case for Defamation,' (D. 370), it is said generally that any words are actionable by which the party has a special damage, but all the examples given in illustration of the rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporal punishment. In all the instances put the words are injurious to the reputation of the person of whom they were spoken." TAUNTON, J. said: "The expression ascribed to the defendant 'these are not times to be robbed' seems to be saying the times are so bad I must hide my

money. If Stenning refused to take the plaintiff into his service on this account he acted without reasonable cause; and in order to make words actionable, they must be such that special damage may be the fair and natural result of them." PATTESON, J., said: "I have always understood that the special damage must be the natural result of the thing done, etc. It is said that the words are actionable, because a person after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful they must in their nature be defamatory. *Vicars v. Wilcocks*, 8 East, 1." It necessarily follows from the rule that the words must be disparaging to character, that the special damage to give an action must flow from disparaging it. In the case last cited the plaintiff actually suffered damage from the defendant's words by their bringing her into disrepute, but the words were not calculated to produce such a result and therefore the action would not lie. In the present case the words were defamatory, and the illness and physical prostration of the plaintiff may be assumed, so far as this part of the case is concerned, to have been actually produced by the slander, but this consequence was not, in a legal view, a natural, ordinary one, as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon any one unfavorable to the plaintiff; and it does not appear that anybody believed it or treated the plaintiff any different from what they would otherwise have done on account of it. The cause was not adapted to produce the result which is claimed to be special damages. Such an effect may and sometimes does follow from such a cause but not ordinarily; and the rule of law was framed in reference to common and usual effects and not those which are accidental and occasional.

It is true that this element of the action for slander in the case of words not actionable of themselves—that the special damages must flow from impaired reputation—has been overlooked in several modern cases, and loss of health and consequent incapacity to attend to business held sufficient special damage. *Bradt v. Towsley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333; but these cases are a departure from principle and should not be followed. If such consequences were sufficient, it would not be necessary to allege in the complaint or prove that the words were spoken in the presence of a third person; if spoken directly to the plaintiff, in the presence of no one else, he might himself, under the recent law allowing parties to be witnesses, prove the words and the damages and be permitted to recover. It has been regarded as unnecessary to an action that the words should be published by speaking them in the presence of some person other than the plaintiff, both

in the case of words actionable and those not actionable. 1 Stark. on Sland. 360; 2 id. 12; Cook's L. of Def. 87.

Where there is no proof that the character has suffered from the words, if sickness results it must be attributed to apprehension of loss of character, and such fear of harm to character, with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action. The loss of character must be a substantive loss, one which has actually taken place.

It is not necessary to decide whether the doctrine which has some support in the courts, that a husband may maintain an action for the slander of his wife producing sickness which prevents her attending to her ordinary business, if it conflicts with the principle now advanced, may be maintained upon some ground of exception to the general rule. It is doubtless true that in such cases the law regards more the loss of the wife's services,¹ which alone entitles the husband to sue, than the influence of the words upon her character, and the husband has no control over the effect of the words; whereas, in other cases, the injury to character, as shown by the special damages, is principally regarded, and unusual extraordinary consequences may be assumed to be in some measure under the control of the party complaining. Still, the objection that special damages of that nature are not a fair, ordinary, natural result of such a wrong, remains, and this objection appears to be alike applicable and entitled to the same force whether the action be brought by the husband or the party slandered. *Olmstead v. Brown*, 12 Barb. 657; *Keenholts v. Becker*, 3 Denio, 346.

ROOSEVELT, J., dissented; all the other judges concurring.

Judgment affirmed.

POLLARD V. LYON.

(91 United States, 225.—1875.)

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Words both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff; and she sues in an action on the case for slander to recover damages for the injury to her name and fame.

Controversies of the kind, in their legal aspect, require pretty careful examination; and, in view of that consideration, it is deemed proper to give the entire declaration exhibited in the transcript which is as follows:—

“That the defendant, on a day named, speaking of the plaintiff,

¹ See *Garrison v. Sun, etc., Ass'n*, 207 N. Y. 1.

falsely and maliciously said, spoke, and published of the plaintiff the words following, 'I saw her in bed with Captain Denty.' That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following, 'I looked over the transom-light and saw Mrs. Pollard,' meaning the plaintiff, 'in bed with Captain Denty;' whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars."

Whether the plaintiff and defendant are married or single persons does not appear; nor is it alleged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made, and the defendant appeared and pleaded the general issue; which being joined, the parties went to trial; and the jury, under the instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. None of the other proceedings in the case, at the special term, require any notice, except to say that the defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover; and the record shows that the court ordered that the motion be heard at general term in the first instance. Both parties appeared at the general term, and were fully heard; and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out the present writ of error.

Definitions of slander will afford very little aid in disposing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows: (1.) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2.) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or, (3.) Defamatory words falsely spoken of a person, which impute to the party

unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4.) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5.) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: (1.) That the words set forth in the declaration are in themselves actionable, and consequently that the plaintiff is entitled to recover, without averring or proving special damage. (2.) That if the words set forth are not actionable *per se*, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offence, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence for which the party may be indicted and punished in this district: and the court is of the opinion that the words do not impute such an offence, for the reason that the declaration does not allege that either the plaintiff or the defendant was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offence by the provincial statute of the 3d of June, 1715, by which it was enacted that persons guilty of those offences, if convicted, should be fined and punished as therein provided. *Kilty's Laws*, ch. xxvii, sects. 2, 3.

Beyond all doubt, offences of the kind involve moral turpitude; but the second section of the act which defined the offence of fornication was, on the 8th of March, 1785, repealed by the legislature of the State. 2 Kilty, ch. xlvii, sect. 4.

Sufficient is remarked to show that the old law of the province defining such an offence was repealed by the law of the State years before the territory, included within the limits of the city, was ceded by the State to the United States; and inasmuch as the court is not referred to any later law passed by the State, defining such an offence, nor to any act of Congress to that effect passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal offence to the plaintiff for which she can be indicted and punished.

Suppose that is so: still the plaintiff contends that the words alleged, even though they do not impute any criminal offence to the plaintiff, are nevertheless actionable in themselves, because the misconduct which they *do* impute is derogatory to her character, and highly injurious to her social standing.

Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. *Clements v. Chivis*, 9 Barn. & Cress. 174; *McClurg v. Ross*, 5 Binn. 219.

Unwritten words, by all, or nearly all, the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offence, for which the party may be indicted and punished. Judges as well as commentators, in early times, experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest, that the incongruities are quite material, and, in some respects, irreconcilable. Nor are the decisions of the courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words which of themselves are actionable, said Lord Holt, must either endanger the party's life, or subject him to infamous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for a common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added that at least the thing charged must "in itself be scandalous." *Ogden v. Turner*, 6 Mod. 104.

Viewed in any proper light, it is plain that the judge who gave the opinion in that case meant to decide that words, in order that they may be actionable in themselves, must impute to the party a criminal offence affecting the social standing of the party, for which the party may be indicted and punished.

Somewhat different phraseology is employed by the court in the next case to which reference will be made. *Onslow v. Horne*, 3 Wil. 186. In that case, DEGRAY, C. J., said the first rule to determine whether words spoken are actionable is, that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor, and that the charge must be precise. Either the words themselves, said Lord KENYON, must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning; otherwise they are not actionable. *Holt v. Scholefield*, 6 Term, 694.

Separate opinions were given by the members of the court in that case; and MR. JUSTICE LAWRENCE said that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor; and he denied that the meaning of words not actionable in themselves can be extended by an innuendo. 4 Co. 17b.

Prior to that, LORD MANSFIELD and his associates held that words imputing a crime are actionable, although the words describe the crime in vulgar language, and not in technical terms; but the case does not contain an intimation that words which do not impute a crime, however expressed, can ever be made actionable by a colloquium or innuendo. *Colman v. Godwin*, 3 Doug. 90; *Woolnoth v. Meadows*, 5 East, 463.

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice it to say, that it was during the period of such uncertainty as to the rule of decision, when a controversy bearing a strong analogy, to the case before the court was presented for decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that bench.

Allusion is made, in the opinion given by JUDGE SPENCER, to the great "uncertainty in the law upon the subject;" and, having also adverted to the necessity that a rule should be adopted to remove that difficulty, he proceeds, in the name of the court, to say, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very exten-

sively adopted in the courts of other States. *Brooker v. Coffin*, 5 Johns. 190; 1 Am. Lead. Cas. (5th ed.) 98.

When he delivered the judgment in that case, he was an associate justice of the court: Chancellor Kent being the chief justice, and participating in the decision. Fourteen years later, after he became chief justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. *Van Ness v. Hamilton*, 19 Johns. 367. On that occasion he remarked, in the outset, that there exists a decided distinction between words spoken and written slander; and proceeded to say, in respect to words spoken, that the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude; and, in our judgment, the rule applicable in such a case is there stated with sufficient fullness, and with great clearness and entire accuracy.

Controverted cases involving the same question, in great numbers, besides the one last cited, have been determined in that State by applying the same rule, which, upon the fullest consideration, was adopted in the leading case,—that in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable.

Attempt was made by counsel in the case of *Widrig v. Oyer*, 13 Johns. 124, to induce the court to modify the rule by changing the word “or” into “and;” but the court refused to adopt the suggestion, and repeated and followed the rule in another case reported in the same volume. *Martin v. Stillwell*, 13 id. 275. See also *Gibbs v. Dewey*, 5 Cowen, 503; *Alexander v. Dewey*, 9 Wend. 141; *Young v. Miller*, 3 Hill, 22; in all of which the same rule is applied.

Other cases equally in point are also to be found in the reported decisions of the courts of that State, of which one or two more only will be referred to. *Bissell v. Cornell*, 24 Wend. 354. In that case, the words charged were fully proved; and the defendant moved for a nonsuit, upon the ground that the words were not in themselves actionable; but the circuit judge overruled the motion, and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the State, NELSON, C. J., giving the opinion of the court, in which it was held that the words were actionable; and the reason assigned for the conclusion is, that the words *impute an indictable offence involving moral turpitude*.

Defamatory words to be actionable *per se*, say that court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction *merely*,

but the offence charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such, as, if true, would subject the party charged to an infamous punishment; but the Supreme Court of the State refused so to hold. *Widrig v. Oyer*, 13 Johns. 124; *Wright v. Page*, 3 Keyes, 582.

Subject to a few exceptions, it may be stated that the courts of other States have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fornication as a crime, or providing that words imputing incontinence to an unmarried female shall be construed to impute to the party actionable misconduct.

Without the averment and proof of special damage, says SHAW, C. J., the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offence punishable by law. *Dunnell v. Fiske*, 11 Met. 552.

Speaking of actions of the kind, PARKER, C. J., said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to disgraceful punishment, or imputing to him some foul and loathsome disease which would expose him to the loss of his social pleasures, are actionable, without any special damage; while words perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a *colloquium*, to some office, business or trust which would probably be injuriously affected by the truth of such imputations. *Chaddock v. Briggs*, 13 Mass. 252.

Special reference is made to the case of *Miller v. Parish*, 8 Pick. 385, as authority to support the views of the plaintiff; but the court here is of the opinion that it has no such tendency. What the court in that case decided is, that whenever an offence is imputed, which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable; which is not different in principle from the rule laid down in the leading case,—that if the charge be such, that, if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history the legislature of Massachusetts defined the act of fornication as a criminal offence, punishable by a fine, and which may be prosecuted by indictment; and, if the person convicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage; but the court held, that, inasmuch as the words alleged imputed a criminal offence which subjected the party to

punishment involving disgrace, the words were actionable; and it is not doubted that the decision is correct. Exactly the same question was decided by the same court in the same way twenty-five years later. *Kenney v. Laughlin*, 3 Gray, 5; 1 Stat. Mass. 1786, 293. Other State courts, where the act of fornication is defined by statute as an indictable offence, have made similar decisions; but such decisions do not affect any question involved in this investigation. *Vandcrip v. Roe*, 23 Penn. St. 182; 1 Am. Lead. Cas. (5th ed.) 103; *Simons v. Carter*, 32 N. H. 459; Sess. Laws (Penn. 1860), 382; Purdon's Dig. 1824, 313.

That the words uttered import the commission of an offence, say the court, cannot be doubted. It is the charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff, and exclude her from society. Though the imputation of crime, said BIGELOW, J., is a test, whether the words spoken do amount to legal slander, yet it does not take away their actionable quality if they are so used as to indicate that the party has suffered the penalty of the law, and is no longer exposed to the danger of punishment. *Krebs v. Oliver*, 12 Gray, 242; *Fowler v. Dowdney*, 2 M. & Rob. 119.

Courts affix to words alleged as slanderous their ordinary meaning: consequently, says SHAW, C. J., when words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. *Alexander v. Angle*, 1 Crompt. & Jer. 143; *Goldstein v. Foss*, 2 Younge & Jer. 146; *Carter v. Andrew*, 16 Pick. 5; *Beardsley v. Tappan*, 2 Blatch. 588.

Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge, or extend their natural and obvious meaning, but only explain something already sufficiently averred or make a more explicit application of that which might otherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or colloquium. *Gosling v. Morgan*, 32 Penn. St. 275; *Shafter v. Kinster*, 1 Binn. 537; *McClurg v. Ross*, 5 id. 218; *Andres v. Koffenheaver*, 3 S. & R. 255.

State courts have in many instances decided that words are in them-

selves actionable whenever a criminal offence is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings disgrace upon the complaining party; but most courts agree that no words are actionable *per se* unless they impute to the party some criminal offence which may be visited by punishment either of an infamous character, or which is calculated to affect the party injuriously in his or her social standing. *Buck v. Hersey*, 31 Me. 558; *Mills v. Wimp*, 10 B. Monr. 417; *Perdue v. Burnett*, Minor, 138; *Demarest v. Haring*, 6 Cow. 76; Townsend on Slander, sect. 154; 1 Wendell's Stark. on Slander, 43; *Redway v. Gray*, 31 Vt. 297.

Formulas differing in phraseology have been prescribed by different courts: but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of *Brooker v. Coffin*, appear "to have reached the true principle applicable to the subject;" and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offence for which the party may be indicted and punished, even though the offence is not technically denominated infamous, if the charge involves moral turpitude, and is such as will affect injuriously the social standing of the party. 1 Am. Lead. Cas. (5th ed.) 98.

Decided support to that conclusion is derived from the English decisions upon the same subject, especially from those of modern date, many of which have been very satisfactorily collated by a very able text-writer. Addison on Torts (3d ed.), 765. Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander. Written slander is punishable in certain cases, both criminally and by action, when the mere speaking of the words would not be punishable in either way. *Villiers v. Mousely*, 2 Wils. 403; *Saville v. Jardine*, 2 H. Bl. 532; Bac. Abr. Slander, B.; *Keiler v. Sessford*, 2 Cr. C. C. 190.

Examples of the kind are given by the learned commentator; and he states that verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but, if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable. 2 Bl. Com. 125, n. 6; *Janson v. Stuart*, 1 Term, 784.

Comments are made in respect to verbal slander under several heads, one of which is entitled defamatory words not actionable without special damage; and the commentator proceeds to remark that mere vituperation and abuse by word of mouth, however gross, is not

actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case. *Lumby v. Allday*, 1 Crompt. & Jer. 301; *Barnet v. Allen*, 3 H. & N. 376.

Even the judges holding the highest judicial stations in that country have felt constrained to decide, that to say of a married female that she was a liar, an infamous wretch, and that she had been all but seduced by a notorious libertine, was not actionable without averring and proving special damage. *Lynch v. Knight*, 8 H. of L. Cas. 594.

Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable, even when special damage is alleged, unless *it is proved*, and the proposition is fully sustained by the cases cited in its support. *Welby v. Elston*, 8 M. G. & S. 142; Addison on Torts (3d ed.), 788; Townsend on Slander, sects. 172 and note, 516-518.

Words actionable in themselves, without proof of special damage, are next considered by the same commentator. His principal proposition under that head is that words imputing an indictable offence are actionable *per se* without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penalties of the criminal law. Beyond question, the authorities cited by the author support the proposition, and show that such is the rule of decision in all the courts of that country having jurisdiction in such cases. *Heming v. Power*, 10 Mees. & Wels. 570; *Alfred v. Farlow*, 8 Q. B. 854; *Edsall v. Russell*, 5 Scott, N. R. 801; *Brayne v. Cooper*, 5 Mees. & Wels. 250; *Barnet v. Allen*, 3 H. & N. 378; *Davies v. Solomon*, 41 Law Jour. Q. B. 11; *Roberts v. Roberts*, 5 B. & S. 389; *Perkins v. Scott*, 1 Hurlst. & Colt. 158.

Examined in the light of these suggestions and the authorities cited in their support, it is clear that the proposition of the plaintiff, that the words alleged are in themselves actionable, cannot be sustained.

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that she "has been damaged and injured in her name and fame;" and she contends that that averment is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form,

and the allegation is sustained by sufficient evidence; but the claim must be specifically set forth, in order that the defendant may be duly notified of its nature, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. *Haddan v. Scott*, 15 C. B. 429.

Whenever proof of special damage is necessary to maintain an action of slander, the claim for the same must be set forth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover. *Vicars v. Wilcox*, 8 East, 3; *Knight v. Gibbs*, 1 Ad. & Ell. 46; *Ayre v. Craven*, 2 id. 8; *Roberts v. Roberts*, 5 B. & S. 389.

When special damage is claimed, the nature of the special loss or injury must be particularly set forth, to support such an action for words not in themselves actionable; and, if it is not, the defendant may demur. He did demur in the case last cited, and COCKBURN, C. J., remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. Addison on Torts (3d ed.), 805; *Wilby v. Elston*, 8 C. B. 148.

Where the words are not in themselves actionable, because the offense imputed involves neither moral turpitude nor subjects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. *Hoag v. Hatch*, 23 Conn. 590; *Andres v. Koppenhefer*, 3 S. & R. 256; *Buys v. Gillespie*, 2 Johns. 117.

In such a case, it is necessary that the declaration should set forth precisely *in what way* the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered *special damages*, or that the party has been put to great costs and expenses. *Cook v. Cook*, 100 Mass. 194.

By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. *Moore v. Meagher*, 1 Taunt. 42; *Williams v. Hill*, 19 Wend. 306.

Illustrative examples are given by the text-writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits, or customers; and it was very early settled that a charge of incontinence against an unmarried female, *whereby she lost her marriage*, was actionable by reason of the special damage alleged and proved. *Davis v. Gardiner*, 4 Co. 16 b, pl. 11; *Reston v. Pomfreicht*, Cro. Eliz. 639.

Doubt upon that subject cannot be entertained: but the special damage must be alleged in the declaration, and proved; and it is not sufficient to allege that the plaintiff "has been damaged and injured in her

name and fame," which is all that is alleged in that regard in the case before the court. *Hartley v. Herring*, 8 Term. 133; Addison on Torts, 805; Hilliard on Remedies (2d ed.), 622; *Beach v. Ranney*, 2 Hill, 309.

Tested by these considerations, it is clear that the decision of the court below, that the declaration is bad in substance, is correct.

*Judgment affirmed.*¹

LIBEL: ACTIONABLE PER SE.

THORLEY v. KERRY.

(4 Taunton, 355.—1812.)

ACTION for libel. Plea, not guilty. The defendant addressed a letter to LORD KERRY, in which, among other things, he imputed to him hypocrisy, malice, uncharitableness and falsehood, and delivered it unsealed to a servant to carry, who opened and read it. Verdict for plaintiff with £20 damages. Plaintiff in error assigned the general errors.

MANSFIELD, C. J. This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to ARCHIBALD LORD DOUGLAS of a messuage in Petersham, that being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the plaintiff in error was church-warden, and that the defendant in error gave him notice of his agreement with LORD DOUGLAS, and that the plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals were sufficiently guarded by the terror of this criminal pro-

¹ There is a tendency by statute to make the imputation of unchastity of a woman actionable *per se*. See, 54 and 55 Vict. c. 51; N. Y. Code Civ. Pro., § 1906.

ceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action, between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgements no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered, whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So, it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, LORD HARDWICKE, Hale, I believe, HOLT, C. J., and others. LORD HARDWICKE, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Co. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says, there is a distinction between written and

spoken scandal, by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken: upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

TILLSON V. ROBBINS.

(68 Maine, 295.—1878.)

ACTION for libel. The first count declares the publication by defendant, in a certain newspaper, of the following words: "The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation, and fraud in the Hurricane Island vote, for which Davis Tillson is without doubt responsible, as he was last year." The second count declares for "a libel of and concerning plaintiff in his business" of merchant and contractor, in the same words, with these added: "Hurricane Island is all owned by Davis Tillson, an intense partisan and an unscrupulous politician. It is leased to government and contains quarries from which is taken granite for public buildings. This granite is bought by government of Tillson, and is there cut by men who receive about \$3.50 per day. On all expenditures Tillson has a gratuity of 15 per cent., for which he renders no equivalent, unless the lease of the island and its facilities be deemed such."

There were innuendoes to the effect that plaintiff had been guilty of the crime of corruption, and fraud at an election. There was no averment of the fact of election, nor colloquium that the words were used in reference thereto.

Defendant's demurrer to the declaration was overruled, and defendant alleged exceptions.

BARROWS, J. The defendant's criticisms upon the writ to which he

has demurred would be pertinent if the case were one of mere verbal slander. But in respect to the supposed requirement that, in order to maintain an action for damages where no crime is imputed, special damage must be alleged and proved, a distinction has been long and uniformly maintained between mere words and written or printed slander. Holt, Libel, (1st Am. Ed.) 218-223. Much which, if only spoken, might be passed as idle blackguardism, doing no discredit save to him who utters it, when invested with the dignity and malignity of print is capable, by reason of its permanent character and wide dissemination, of inflicting serious injury.

The cases, ancient and modern, where this distinction has been regarded, are numerous. A reference to a few of them will serve all the purposes of a more elaborate discussion. LORD HOLT says: "Scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." *Cropp v. Tilney*, 3 Salk. 226.

To say of a man, "He is a dishonest man," is not actionable without special damage alleged and proved; but to publish so, or to put it upon posts, is actionable. *Austin v. Culpeper*, Skin. 124.

In *Villiers v. Monsley*, 2 Wils. 403, the court say: "There is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable either way. For speaking the words 'rogue' and 'rascal' of any one an action will not lie, but if those words were written and published of any one an action will lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, no doubt but the action well lies."

In another case, where the defendant had applied the epithet "villain" to the plaintiff in a letter to a third person, and the plaintiff, though alleging, failed to prove, any special damage, the court ordered judgment for the plaintiff, expressing the opinion that "any words written and published, throwing contumely on the party, are actionable." *Bell v. Stone*, 1 Bos. & P. 331.

In one of Christian's notes to Blackstone mention is made of a case where a young lady recovered £4,000 damages for reflections upon her chastity, published in a newspaper, though she could not, under English laws, without alleging special damages, such as loss of marriage or the like, have maintained an action for verbal slander containing the grossest aspersions upon her honor.

In *Janson v. Stuart*, 1 Term R. 748, it was held that to print of any person that he is a swindler is a libel and actionable; for it is not necessary, in order to maintain an action for libel, that the imputation should be one which, if spoken, would be actionable as slander.

In *Thorley v. Kerry*, 4 Taunt. 355, the words of the alleged libel, as declared on, were: "I pity the man [meaning the plaintiff] who can so far forget what is due to himself and others as, under the cloak of religion, to deal out envy, hatred, malice, uncharitableness, and falsehood." Mansfield, chief justice of the common pleas, pronouncing judgment for the plaintiff in the exchequer chamber at Easter term, 1812, while he declared himself personally disposed to repudiate the distinction between written and unwritten scandal, says: "I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written for which an action could not be maintained if spoken." For later English cases maintaining the same doctrine, see *McGregor v. Thwaites*, 3 Barn. & C. 24; *Clement v. Chivis*, 9 Barn. & C. 172; *Woodard v. Dowling*, 2 Man. & R. 74; *Shipley v. Todhunter*, 7 Car. & P. 680; *Parmiter v. Coupland*, 6 Mees. & W. 105.

The American cases on this point follow in the same line with the English. *Runkle v. Meyer*, 3 Yeates, 518; *McCorkle v. Binns*, 5 Bin. 345; *McClurg v. Boss*, 5 Bin. 218; *Dexter v. Spear*, 4 Mason, 115; *Dunn v. Winters*, 2 Humph. 512; *Clark v. Binney*, 2 Pick. 113, 116; *Stow v. Converse*, 3 Conn. 325; *Hillhouse v. Dunning*, 6 Conn. 391; *Shelton v. Nance*, 7 B. Mon. 128; *Mayrant v. Richardson*, 1 Nott & McC. 347; *Colby v. Reynolds*, 6 Vt. 489.

It is true that some able jurists agree with MANSFIELD, C. J., in doubting whether this distinction between verbal and written or printed slander is well founded in principle, while they recognize the force of the authorities which sustain it. Others maintain it upon reasons as well as authority. The subject is discussed with numerous references to cases, old and new, English and American, in a note to *Steele v. Southwick*, in 1 Hare & W. Lead. Cas. (5th Ed.), 123.

Steele v. Southwick, was an early case in New York, decided in 1812, and reported in 9 Johns. 214. It was there held that the published words complained of, if they did not import a charge of perjury in the legal sense, were nevertheless libelous, as holding the plaintiff up to contempt and ridicule, as regardless of his obligations as a witness and unworthy of credit, and that they were consequently actionable. We concur entirely in the remarks of the court that "to allow the press to be the vehicle of malicious ridicule of private character would soon deprave the moral taste of the community, and render the state of society miserable and barbarous. It is true that such publications are also indictable as leading to a breach of the peace, but the civil remedy is equally fit and appropriate." We do not mean to say that every indictable libel would be a good foundation for a civil action.

* * * * *

It is sufficient to dispose of this demurrer to hold that, in an action for written or printed slander, though no special damage is alleged, and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt, or ridicule, or deprive him of the benefits of public confidence and social intercourse.

It cannot be successfully contended that the statements alleged in this writ to have been published by the defendant in his newspaper, of and concerning the plaintiff, would not, if believed, tend strongly to deprive him of public confidence, and expose him to public hatred and contempt. . . .

APPLETON, C. J., and WALTON, DICKERSON, DANFORTH, and PETERS, JJ., concurred.

Exceptions overruled.

MOORE v. FRANCIS.

(121 New York, 189.—1890.)

ACTION for libel. Verdict for defendants. Appeal by the plaintiff from a judgment of the General Term of the Supreme Court affirming the judgment entered on the verdict, and an order denying a motion to set aside the verdict and for a new trial.

ANDREWS, J. The alleged libelous publication which is the subject of this action was contained in the Troy Times of September 15, 1882, in an article written on the occasion of rumors of trouble in the financial condition of the Manufacturers' National Bank of Troy, of which the plaintiff was at the time of the publication, and for 18 years prior thereto had been, teller. The rumors referred to had caused a "run" upon the bank; and it is claimed by the defendants, and it is the fair conclusion from the evidence, that the primary motive of the article was to allay public excitement on the subject.

That part of the publication charged to be libelous is as follows: "Several weeks ago it was rumored that Amasa Moore, the teller of the bank, had tendered his resignation. Rumors at once began to circulate. A reporter inquired of Cashier Wellington if it was true that the teller had resigned, and received in reply the answer that Mr. Moore was on his vacation. More than this the cashier would not say. A

rumor was circulated that Mr. Moore was suffering from overwork, and that his mental condition was not entirely good. Next came reports that Cashier Wellington was financially involved, and that the bank was in trouble. A Times reporter at once sought an interview with President Weed of the bank, and found him and Directors Morrison, Cowee, Bardwell, and others in consultation. They said that the bank was entirely sound, with a clear surplus of \$100,000; that there had been a little trouble in its affairs, occasioned by the mental derangement of Teller Moore; and that the latter's statements, when he was probably not responsible for what he said, had caused some bad rumors."

The complaint is in the usual form, and charges that the publication was false and malicious, made with intent to injure the plaintiff in his good name and credit in his occupation as bank teller, and to cause it to be believed that, by reason of mental derangement, he had become incompetent to discharge his duties, and had caused injury to the bank, etc.

The court on the trial was requested by the plaintiff's counsel to rule, as a question of law, that the publication was libelous. The court refused, but submitted the question to the jury. The jury found a verdict for the defendants, and, as the verdict may have proceeded upon the finding that the article was not libelous, the question is presented whether it was *per se* libelous. If it was, the court erred in leaving the question to the jury. It is the settled law of this state that, in a civil action for libel, where the publication is admitted, and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law, which the court must decide. *Snyder v. Andrews*, 6 Barb. 43; *Matthews v. Beach*, 5 Sandf. 256; *Hunt v. Bennett*, 19 N. Y. 173; *Lewis v. Chapman*, 16 N. Y. 369; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211. Of course, an error in submitting the question to the jury would be harmless if their finding that the publication was not libelous was in accordance with its legal character. The import of the article, so far as it bears upon the plaintiff, is plain and unequivocal. The words amount to a distinct affirmation—first, that the plaintiff was teller of the bank; second, that while acting in this capacity he became mentally deranged; third, that the derangement was caused by overwork; fourth, that while teller, and suffering from this mental alienation, he made injurious statements in respect to the bank's affairs which occasioned it trouble.

The cases of actionable slander were defined by Chief Justice DE GREY in the leading case of *Onslow v. Horne*, 3 Wils. 177; and the classification made in that case has been generally followed in England and this country. According to this classification, slanderous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or

- (3) which tend to injure a party in his trade, occupation, or business; or
- (4) which have produced some special damage.

Defamatory words, in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken. Actions of slander, for the most part, are founded upon such imputations. But the action lies in some cases where the words impute no criminal offense; where no attack is made upon the moral character, nor any charge of personal dishonor. The first and larger class of actions are those brought for the vindication of reputation, in its strict sense, against damaging and calumnious aspersions. The other class fall, for the most part at least, within the third specification in the opinion of Chief Justice DE GREY, of words which tend to injure one in his trade or occupation. The case of words affecting the credit of a trader, such as imputing bankruptcy or insolvency, is an illustration. The action is maintainable in such a case, although no fraud or dishonesty is charged, and although the words were spoken without actual malice. The law allows this form of action not only to protect a man's character as such, but to protect him in his occupation, also, against injurious imputations. It recognizes the right of a man to live, and the necessity of labor, and will not permit one to assail by words the pecuniary credit of another, except at the peril, in case they are untrue, of answering in damages. The principle is clearly stated by BAYLEY, J., in *Whittaker v. Bradley*, 7 Dowl. & R. 649: "Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business, are actionable." Where proved to have been spoken in relation thereto, the action is supported; and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed. *Craft v. Boite*, 1 Saund. 243, note; 1 Amer. Lead. Cas. 135.

The authorities tend to support the proposition that spoken words imputing insanity are actionable *per se* when spoken of one in his trade or occupation, but not otherwise, without proof of special damage. *Morgan v. Lingen*, 8 Law T. 800; *Joannes v. Burt*, 6 Allen, 236. The imputation of insanity in a written or printed publication is *a fortiori* libelous where it would constitute slander if the words were spoken. Written words are libelous in all cases where, if spoken, they would be actionable; but they may be libelous where they would not support an action for oral slander. There are many definitions of libel. The one by Hamilton in his argument in *People v. Croswell*, 3 Johns. Cas. 354, viz., "a censorious or ridiculing writing, picture, or sign, made with mischievous and malicious intent towards government, magistrates, or individuals," has often been referred to with approval. But, unless the word *censorious* is given a much broader signification than strictly

belongs to it, the definition would not seem to comprehend all cases of libelous words. The word "libel," as expounded in the cases, is not limited to written or printed words which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticize or censure him. In the case before referred to, words affecting a man injuriously in his trade or occupation may be libelous although they convey no imputation upon his character. Words, says Starkie, are libelous if they affect a person in his profession, trade, or business, "by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof." Starkie, *Sland. & L.* § 188.

The cases of libel founded upon the imputation of insanity are few. The declaration in *Morgan v. Lingen*, *supra*, contained a count for libel, and also for verbal slander. The alleged libel was a letter written by the defendant in which he states that "he had no doubt that the plaintiff's mind was affected, and that seriously," and also that "she had a delusion," etc. It appeared that the defendant had also orally stated, in substance, the same thing. It was claimed that the writing was justified. The plaintiff was a governess. MARTIN, B., in summing up to the jury, said that "a statement in writing that a lady's mind is affected, and that seriously, is, without explanation, *prima facie* a libel." In respect to the slander, he said "he thought there was no evidence of any special damage. The jury must, therefore, consider whether the defendant ever intended to use the expressions he did with reference to the plaintiff's profession of governess."

In *Perkins v. Mitchell*, 31 Barb. 465, it was held to be libelous to publish of another "that he is insane, and a fit person to be sent to the lunatic asylum;" EMOTT, J., saying: "Upon this point the case is clear." *Rex v. Harvey*, 2 Barn. & C. 257, was an information for libel for publishing in a newspaper that the king "labored under mental insanity, and it stated that the writer communicated the fact from authority." The judge charged that the publication was a libel, and the charge was held to be correct. The foregoing are the only cases we have noticed upon the point whether a written imputation of insanity constitutes a libel. Several of the text-writers state that to charge in writing that a man is insane is libelous. Addison on Torts, 768; Townshend on Slander, § 177; Starkie on Slander, § 164; Odgers on Slander, 23.

The publication now in question is not simply an assertion that the plaintiff is or has been affected with "mental derangement," disconnected with any special circumstances. The assertion was made to account for the trouble to which the bank had been subjected by reason of injurious statements made by the plaintiff while in its employment. Words, to be actionable on the ground that they affect a man in his trade or occupation, must, as is said, touch him in such trade or occupa-

tion; that is, they must be shown, directly or by inference, to have been spoken of him in relation thereto, and to be such as would tend to prejudice him therein. *Sanderson v. Caldwell*, 45 N. Y. 405, and cases cited. The publication did, we think, touch the plaintiff in respect to his occupation as bank teller. It imputed mental derangement while engaged in his business as teller, which affected him in the discharge of his duties. The words conveyed no imputation upon the plaintiff's honesty, fidelity, or general capacity. They attributed to him a misfortune brought upon him by an overzealous application in his employment. While the statement was calculated to excite sympathy, and even respect, for the plaintiff, it nevertheless was calculated, also, to injure him in his character and employment as a teller. On common understanding, mental derangement has usually a much more serious significance than mere physical disease. There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence, such as that of a bank teller, whether the insanity is temporary or not, although accompanied by the explanation that it was induced by overwork, is calculated to injure and prejudice him in that employment, and especially where the statement is added that, in consequence of his conduct in that condition, the bank has been involved in trouble. The directors of a bank would naturally hesitate to employ a person as teller whose mind had once given way under stress of similar duties, and run the risk of a recurrence of the malady. The publication was, we think, defamatory, in a legal sense, although it imputed no crime, and subjected the plaintiff to no disgrace, reproach, or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss, and deprive him of those advantages and opportunities as a member of the community which are open to those who have both a sound mind and a sound body. The trial judge, therefore, erred in not ruling the question of libel as one of law. The evidence renders it clear that no actual injury to the plaintiff was intended by the defendants; but it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with good motives, and in an honest belief in its truth.

The judgment should be reversed, and a new trial granted.

All concur.

Judgment reversed.

PUBLICATION.

SNYDER v. ANDREWS.

(6 Barbour, 43.—1849.)

ACTION for libel. At the trial, defendant admitted that he wrote the letter containing the alleged libel, sealed the same, and put it into the post-office at Saratoga Springs, directed to the plaintiff, at his residence. The plaintiff proved by John R. Brown, that the letter was read to the witness by the defendant, at his office, in the presence of a young man who was a clerk of the defendant. The defendant's counsel then moved for a nonsuit, on the ground that a publication of the libel had not been proved. The judge denied the motion.

Verdict for the plaintiff of \$250. Defendant, upon a bill of exceptions, moved for a new trial.

WILLARD, J. There are only three points raised by this bill of exceptions, viz., first, whether the reading of a letter, alleged to be libellous, to a third person, is a publication.

The fact that the defendant read the letter to a stranger, before it was sent to the plaintiff, was not questioned on the trial, and is assumed to be true by the form of the objection; but it is insisted that such reading did not amount to a publication of the libel. No man incurs any civil responsibility by what he thinks or even writes, unless he divulges his thoughts to the temporal prejudice of another. Hence, a sealed letter containing libellous matter, if communicated to no one but to the party libelled, is not the foundation for a civil action, although it may be of an indictment. *Lyle v. Clason*, 1 Caines, 581; *Hodges v. The State*, 5 Humphrey, 112; 1 Wms. Saund. 132, n.2; *Phillips v. Jansen*, 2 Esp. 626; 2 Starkie on Slander (Wend. ed.), 14. But where the defendant, knowing that letters addressed to the plaintiff were usually opened by and read by his clerk, wrote a libellous letter and directed it to the plaintiff, and his clerk received and read it, it was held there was a sufficient publication to support the action. *Delacroix v. Thevenot*. And in *Schenck v. Schenck*, 1 Spencer, 208, a sealed letter addressed and delivered to the wife containing a libel on her husband was held a publication sufficient to enable the latter to sustain an action. Reading or singing the contents of a libel in the presence of others has been adjudged a publication. 2 Starkie on Slander, 16; 5 Rep. 125; 9 Id. 59 b; 1 Saund. 132, n. 2. The reading of the letter in question by the defendant in the presence of Brown was a sufficient publication to sustain this action.

* * * * *

New trial denied.

SHEFFILL v. VAN DEUSEN.

(13 Gray, 304.—1859.)

ACTION for slander. The judge, before whom the case was tried, signed a bill of exceptions, as follows: "The words claimed to have been slanderous were spoken, if at all, at the dwelling-house of the defendants, and in that part thereof called the bakery, where bread and other articles were sold to customers; and were spoken by Mrs. Van Deusen to Mrs. Sheffill.

"The defendants asked the court to instruct the jury that if the words alleged in the plaintiffs' declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action.

"The court declined so to instruct, but did instruct the jury that, if the words were publicly uttered in the bakery of the defendants, there was a sufficient publication, though the plaintiff has not shown that any other person was present, at the time they were spoken, but Mrs. Sheffill and Mrs. Van Deusen. The jury returned a verdict for the plaintiffs, and the defendants except."

BIGELOW, J. Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So, too, it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language, which no one present understood, no action will lie therefor. *Edwards v. Wooton*, 12 Coke, 35; *Hickes's Case*, Pop. 139, and Hob. 215; *Wheeler and Appleton's Case*, Godb. 340; *Phillips and Jansen*, 2 Esp. 624; *Lyle v. Clason*, 1 Caines, 581; *Hammond* N. P. 287.

It is quite immaterial, in the present case, that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by a third person? The defendants were therefore entitled to the instructions for which they asked.

Exceptions sustained.

GAMBRILL V. SCHOOLEY.

(93 Maryland, 48.—1901.)

PEARCE, J. This is an action of libel in which the appellee recovered a judgment for \$500 against the appellant in the Superior Court of Baltimore City. The plaintiff offered 5 prayers, all of which were granted; and the defendant offered 15 prayers, of which the 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, and 14th were granted and his 1st, 2d, 3d, 9th, and 15th were rejected. A single exception was taken by the defendant to this ruling on the prayers, and the three following questions arise upon the exception:

1st. Whether the dictation of alleged libellous letters to defendant's private and confidential stenographer, their reduction by her to stenographic characters, and subsequent reduction to the characters of the alphabet by means of a typewriter, their signing by the defendant, and their transmission by his direction to the plaintiff, are in law a publication of such letters, where there is no communication of any of said letters in any manner to any other person.

2nd. Whether in such case, the proper action is for libel or slander.

3rd. Whether, under the testimony in this case, the jury was properly instructed as to the allowance of exemplary or vindictive damages.

There were three counts in the declaration, upon three separate letters, and the case was tried on the general issue plea, there being no plea of justification alleging the truth of any of the charges contained in any of the letters, either in whole or in part.

Of the libellous character of each of these letters there can be no question, but the letter in the 3d count was shown by the uncontradicted testimony to be wholly in the handwriting of defendant, and never to have been read or exhibited to any one but the plaintiff; and the jury was properly instructed by the defendant's 4th prayer that there could be no recovery on the 3d count.

It was very earnestly and ably argued by the appellant's counsel that, as the two letters in the 1st and 2d counts were not *otherwise published* than as above stated, there was no *actionable publication* of either letter, so as to make either one a libel, and consequently, that the Court erred in granting the plaintiff's 3½ and 4½ prayers, and in rejecting the 1st, 2d, and 3d prayers, which, respectively, raised the contentions of the parties on this point.

This is certainly an important question, and one which has never before been raised in this Court. Indeed, the appellant's counsel states in his brief, that it has never been expressly ruled upon in America, though he has referred us to a case in the Appellate Division of the

Supreme Court of New York (*Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465), which he contends supports his position. The appellee's counsel has submitted a very full brief, but has referred us to no American case upon this point. If such authorities existed, we may safely assume they would not have escaped the well-known diligence of counsel, and we have found none such in our own examination; but the principles and considerations upon which this question should be decided are not, in our opinion, difficult to determine, and the instructive English cases which have been cited are in accord with these principles and considerations.

Before considering the argument of the appellant, it will be well to recall the definition of publication, given by competent authority, as necessary to constitute slander or libel. Mr. Odgers, in his work on Libel and Slander, page 150, defines publication as applicable either to slander or libel, as "the communication of the defamatory words to some third person;" and on page 1, he says, "False defamatory words, if written *and published*, constitute a libel; if spoken, a slander." It is obvious however, that publication is essential to either, and that the words "if published," though not repeated in the latter clause, must be understood as if repeated. For to shout aloud defamatory words on a desert moor, where no one hears them, is not a publication of the slander, nor is the utterance of such words in a foreign language, a publication, if no one present understands their meaning. *Id.* 151.

For the same reason, very clearly, if one should write a defamatory letter, and hand it to a third person, to be read, who does not understand and cannot read that language, there would be no publication of the libel. In *Pullman v. Walter Hill & Co.*, [1891], 1 Q. B. 529, LOPES, L. J., defines publication of a libel in the exact words cited from Mr. Odgers, and in the same case, LORD ESHER, Master of the Rolls, defines it, more fully, and perhaps with more technical accuracy, as "the making known the defamatory matter, after it has been written, to some person other than the person to whom it is written." Appellant's counsel, in his brief, says, with equal clearness and accuracy: "Publication, in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person, other than the parties to the suit."

Bearing in mind these definitions and simple illustrations of what is, and what is not, publication, it will be seen that the argument that there has been no actionable publication in this case, divides itself into two branches. The theory of the first branch is, that while there was in fact a physical or mechanical reception by the stenographer of the thoughts expressed by the appellant, that such reception was instantaneous only, and merely sufficient for their reduction to written characters; but that there was no comprehension, and no lodgment, of their meaning in the brain of the recipient, who acted as a mere phonograph,

and whose function in that regard was not a mental, but purely a mechanical process; so that there was no such perception as is requisite to constitute publication. This theory is both ingenious and subtle, but we cannot be persuaded it is sound. We cannot doubt that the dictation to Miss Willis, though taken down in stenographic characters, produced in her mind as full and complete perception of the thoughts of the appellant as a slower dictation, for the purpose of reduction to ordinary characters, would have produced in the mind of one not a stenographer. If this were not so, there could be no assurance that there would be an accurate reproduction of the matter dictated, such as common knowledge gives assurance of from any skillful stenographer. A communication, therefore, to a stenographer must be regarded precisely as a communication to an ordinary amanuensis, and as establishing all that is ordinarily necessary to constitute publication.

The second branch of the argument is, that in view of the fact that Miss Willis was the private and confidential stenographer of the defendant, and in view of the almost universal employment, in this country, of such stenographers, and the necessity for such employment consequent upon the demands of business, a communication to such a stenographer should be made an exception to the general rule, and be held not to be an actionable publication. But we cannot adopt this view. Apart from any precedent or authority, we can perceive no good reason why such an exception should be made to the rule. Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the stenographer is under contractual or moral obligation to regard all his employer's communications as confidential alter the reason of the matter. This defence was made in *Williamson v. Freer*, L. R. 9 C. P. 393, where it was held that the unnecessary transmission by a post-office telegram, of libellous matter, which would have been privileged, if sent in a sealed letter, avoids the privilege; LORD COLERIDGE, C. J., saying: "Although the clerks are prohibited under severe penalties from disclosing the contents of telegrams passing through their hands, still there is disclosure to them."

In *Pullman v. Hill*, already cited, the exact question here presented was decided. There, the letter containing the defamatory matter was dictated by the managing director of a corporation to a clerk, who took down the words in shorthand, and then wrote them out fully by means of a typewriting machine, and the letter thus written was copied by an office boy in a letter-press book. When it reached its destination, it was, in the ordinary course of business, opened by a clerk of the plaintiff; and it was held that the letter must be taken to have been published

both to the typewriter and to the copy-press boy, as well as to the plaintiff's clerk. LORD ESHER, M. R., in the course of his opinion, said: "I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself." LOPES, L. J., said: "It is said business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter, he must write it himself and copy it himself, or he must take the consequences." KAY, L. J., said: "The consequence of such an alteration in the law of libel would be this, that any merchant or solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent."

We were referred to *Boxsius v. Goblet Freres* (1894), 1 Q. B. Div. 843, as evincing a disposition to qualify the rule in *Pullman v. Hill*, but we cannot discover such disposition, and if we could, we should not be inclined to follow it. There the libellous letter was dictated by a solicitor, acting in behalf of and at the direction of his client, and copies were made as in the case mentioned. The court distinguished the case very clearly from *Pullman v. Hill*, holding, through two of the same judges, that the solicitor owed to his client the duty to act on his instructions, and that if the solicitor had communicated directly with the plaintiff, the communication would have been privileged, and that he could discharge that duty, as he did other business of the office, in the ordinary way, without losing the privilege. But there was no question of privilege in *Pullman v. Hill*, and there is none here, as the appellant owed no duty in the matter to any one. The typewriter had no conceivable interest in hearing or seeing the letters, and there could be, therefore, no privilege between her and the appellant.

In *Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, the alleged libellous letter relating to the business of a corporation, was dictated by its manager to its stenographer, who wrote it out in shorthand, copied it upon a typewriter, and mailed it. The manager and stenographer were held to be servants of a common master, and to be engaged in the performance of duties which their respective employments required, and that under such circumstances the stenographer should not be regarded as a third person, in the sense that either the dictation or the subsequent reading should be regarded as a publication by the corporation. The English cases mentioned were not referred to, but the Court never-

theless said: "It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged." Upon the exact question here involved, the above extract from the opinion in that case seems to afford slender support to the appellant's contention, and what it does decide is not in accord with the views expressed by this court in *Carter v. Machine Co.*, 51 Md. 294, in which Judge ALVER said that it would seem to be now clear, whatever may have been the former state of judicial opinion upon the subject, that corporations are liable for all acts, whether willful or malicious, of their agents or servants, done in the course of their employment, and that actions for such injuries, including libel, could be sustained against corporations in any case where, under similar circumstances, such action could be sustained against individuals for the acts of their servants. It is true that that case was not an action for libel, but it sufficiently indicates that this Court would not be astute to find reasons for relieving corporations from liability in libel cases for want of technical publication. We think, for the reasons given above, that the defendant's 1st prayer was properly rejected.

Apart from the question of publication, the defendant's 2d and 3d prayer raise the additional question whether, under the pleadings in this case, the action must not have been for slander, instead of libel, but we have no difficulty on this point. We have no doubt that the dictation of these letters to the stenographer was the publication of a slander, for which, if nothing further had been done by either, an action of slander could have been maintained, but we have no more doubt that the stenographic notes, the typewritten copy and the letter-press copy constituted the publication of a libel, and that either slander or libel could be maintained, as the appellee should select. This conclusion, we think, necessarily follows from what we have already said, without more formally stating the reasons, and our conclusion is not shaken by Mr. Odgers' criticism of the decision in *Pullman v. Hill*, upon the form of action, to be found on page 174 of his last edition. We therefore think the defendant's 2d and 3d prayers were properly rejected, not only for the reasons now given, but for those applicable to defendant's 1st prayer, and that the plaintiff's 3½ and 4½ prayers were for the same reasons properly granted. The plaintiff's 1st and 2d prayers were not questioned at the argument and are so clearly correct as to require no notice. The plaintiff's 5th prayer was also properly granted for reasons which will appear when we come to consider the defendant's 8th prayer.

The defendant's 9th prayer was properly rejected, because it precluded the jury from including in their verdict any allowance whatever

for exemplary or punitive damages. Whenever the words charged in an action for slander or libel are actionable *per se*, as in this case, the damages are exclusively within the sound discretion of the jury. 13 Am. & Eng. Enc. Law, 432; *Tripp v. Thomas*, 3 Barn. & C. 427; *Marks v. Jacobs*, 76 Ind. 216; *Nolan v. Traber*, 49 Md. 470; *Negley v. Farrow*, 60 Md. 148. Whether exemplary damages shall be given or not, is in all cases for the jury. *Jerome v. Smith*, 48 Vt. 230; *Boardman v. Goldsmith*, Id. 403.

The assessment of damages is peculiarly the province of a jury in an action for libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. *Davis v. Shepstone*, 11 App. Cas. 191, per LORD HERSHELL. The jury must not be restricted by a direction not to give such damages. *De Vaughn v. Heath*, 37 Ala. 595.

The plaintiff's 5th prayer is in accord with these principles and was therefore properly granted. We cannot, however, avoid the conclusion that there was error in the rejection of the defendant's 15th prayer, which asked that the jury be instructed, if the defendant honestly and in good faith believed the statements contained in the letters to be true, and had grounds for such belief sufficient to satisfy an ordinarily prudent and cautious man that such statements were true, then the jury might take into consideration all the circumstances of the case, and in the exercise of their discretion, award to the plaintiff nominal damages merely. This prayer is very carefully guarded by the requirement to find honest belief of the truth of the charges, and of reasonable ground for such belief, and in its conclusion is substantially the converse of the proposition contained in the plaintiff's 5th prayer, which we have said was properly granted. By the rejection of the defendant's 15th prayer, the jury were practically told they must give exemplary damages, and were absolutely refused the discretion to withhold them. But in no case has a plaintiff any legal right to exemplary damages. Such damages depend upon the case and evidence and finding of the jury. *Jerome v. Smith*, *supra*.

Where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury. *Boardman v. Goldsmith*, 48 Vt. 403. And it is error to instruct them they must give exemplary damages. Sedg. Dam. 333; *Hawk v. Ridgway*, 33 Ill. 472.

The words used here being actionable *per se*, although there was no proof of actual and substantial damages sustained by the publications to Miss Willis of the two letters, the jury could not properly have been deprived of their discretion to give exemplary damages, if they found malice, nor could they, on the other hand, either by the granting of an erroneous instruction or the rejection of a proper one, be deprived

of their discretion to refuse to award exemplary damages if they found no malice.

For the error in the rejection of the defendant's 15th prayer, it will be necessary to reverse the judgment that a new trial may be had.

*Judgment reversed, with costs to appellant,
above and below, and new trial awarded.*

EMMENS V. POTTLE.

(L. R. 16 Queen's Bench Division, 354.—1885.)

APPEAL from the judgment of WILLS, J., at the trial of the action with a jury.

The plaintiff by his statement of claim alleged that "the defendants on or about the 11th of February, 1885, at Nos. 14 and 15 Royal Exchange, in the city of London, did falsely and maliciously publish of the plaintiff, in the form of an article appearing in the newspaper known as Money, bearing date the 11th of February, 1885, by the sale thereof by their servants or agents, at such time and places aforesaid, for the defendants' benefit, to one Ernest Clarke," certain words set out in the statement of claim. The plaintiff alleged that in consequence of the premises he had been and was greatly injured in his credit and reputation, and he claimed £5,000 damages.

By the statement of defence (par. 1) the defendants denied that they had published the alleged libel. And further and alternately (par. 2) the defendants said that "they are news-vendors, carrying on a large business at 14 and 15 Royal Exchange, in the city of London, and as such news-vendors, and not otherwise, sold copies of the said periodical called Money in the ordinary course of their said business, and without any knowledge of its contents, which is the alleged publication."

The plaintiff by his reply joined issue on the first paragraph of the defence. And as to the second paragraph of the defence the plaintiff said that "the allegations therein contained are bad in substance and in law, on the ground that, even if the defendants sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business, as alleged in their defence, still, inasmuch as the defendants sold the said copies as news-vendors for reward in that behalf, the said allegations disclose no answer to the plaintiff's claim."

The jury, in answer to questions put to them by the judge, found that "the defendants did not nor did either of them know that the newspapers at the time they sold them contained libels on the plaintiff; that it was not by negligence on the defendants' part that they did not

know there was any libel in the newspapers; and that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so." The judge directed the jury to assess the damages provisionally, and the judge then ordered judgment to be entered for the defendants, with costs.

The plaintiff appealed.

LORD ESHER, M. R. I am afraid it will not be much satisfaction to the plaintiff, as I am going to decide against him, for me to say that it would be impossible for any one to have argued a case in better form or with better logic than he has argued his own case. The principle is no doubt a very important one, and one well worthy of consideration. I do not intend to lay down any general rule as to what will absolve from liability for a libel persons who stand in the position of these defendants. But it is a material element in their position that the jury have found in their favor as they have done. I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolve them from liability, not by way of privilege, but facts which show that they did not publish the libel. We must first consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff; they did not write or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel. If they were liable, the result would be that every common

carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shows that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and in my opinion any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the Common Law of England. I think, therefore, that upon the findings of the jury, the judgment for the defendant is right.

BOWEN, L. J. The jury have found as a fact that the defendants were innocent carriers of that which they did not know contained libellous matter, and which they had no reason to suppose was likely to contain libellous matter. A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it if he knows, or ought to know, that the paper is one which is likely to contain a libel.

COTTON, L. J., concurred.

Appeal dismissed.

CONSTRUCTION OF LANGUAGE.

MORE v. BENNETT.

(48 New York, 472.—1872.)

APPEAL from a judgment of the General Term of the Supreme Court, reversing an order of Special Term which set aside a nonsuit of the Trial Term and granted a new trial, in an action for an alleged libel, contained in a letter addressed to the editor of the New York Herald and published in a certain edition of that paper.

Hunt, C. The plaintiff has received a scant measure of justice in the disposition of this case. The defendant was allowed to amend his answer by striking out those parts which admitted the publication of the libel, and substantially admitted it to be a libel. The plaintiff was refused permission to amend his complaint by adding a statement, the

presence of which was held necessary to enable him to prove that the publication was libelous. For want of such a statement the plaintiff was thereupon nonsuited, and an allowance of \$500 was granted to his adversary upon a trial which, to judge from the report, could not have occupied more than two hours. The nonsuit was set aside at the Special Term, but was affirmed upon an appeal to the General Term of the first district.

The complaint charged the publication of a letter written by Mrs. Kimball, set forth at length, in which she charged, among other things, that letters of her deceased husband were returned to her, after having been in the hands of a prostitute; that in the hands of this prostitute were other relics sacred to a wife; that the police had called upon this woman and she refused to give up anything belonging to the writer. The letter added; "She (the prostitute) is, I understand, under the patronage or protection of a Mr. More, agent of the Central railroad." The plaintiff alleges that this charge respecting himself was false and malicious; that it tended to blacken and injure his reputation and expose him to public contempt. He was non-suited on the ground that he did not allege that the publication intended to charge that the prostitute was under his protection for illicit purposes, and that therefore his complaint stated no cause of action.

In my judgment no man can read this statement without understanding it to contain a charge that this woman was the kept mistress of the plaintiff. To state that Anne Smith is a prostitute, and she is under the patronage or protection of Mr. More, is a charge that she is kept, protected or patronized for the purposes of prostitution. That a loose woman is under the patronage of a man named, is a technical statement that she is supported by him, for the purpose of sexual indulgence. When read in a book or newspaper, it would naturally have this only meaning. Add to this that the charge was false, made to blacken the character of More, and the statement is plainly within the law of libel. No one would understand the statement as meaning that the prostitute was an inmate of a reformatory institution, and that Mr. More was one of its supporters and thus protected and patronized her. Such a meaning to the words is possible, but it is most unnatural and forced. That any intelligent man would so understand the charge would exhibit a degree of charity and kindness of heart not often found in this censorious world.

In *Cooper v. Greeley*, 1 Denio, 358, the rule is thus laid down by JEWETT, J.: "It is the duty of the court in an action for a libel to understand the publication in the same manner that others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libelous, is to be derived as well from the expression used as from the whole scope and apparent object of the

writer." To this rule he cites various authorities. I understand the principle there to be correctly laid down, to wit, the scope and object of the whole article is to be considered, and such construction put upon its language as would naturally be given to it. That case afforded a good illustration of the rule. Mr. Cooper had sued Mr. Greeley for a libel. The defendant in his newspaper, in commenting on the proceeding says: "There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there." Another action was brought for the libel contained in the last sentence quoted, which it was alleged intended to charge that the plaintiff was in such bad repute in Otsego county that he would not like to bring a suit there. The question came up on demurrer, and the declaration was held good. The opinion to which I have referred is an elaborate one, reviewing all the cases upon the subject.

In the case of *Stone v. Cooper*, 2 Denio, 293, an award had been made against another editor, who, in speaking of it, said, in his paper: "The money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that period." On demurrer, this was held not to be libelous, on the ground that it fairly meant that the money was to be used in Wall street in buying, at a discount, existing securities, and that such purchase was neither illegal nor disreputable. Both cases were decided upon the principle that the language is to be construed fairly and naturally. It is not enough that a critic or a malignant may torture the expressions into a charge of a criminal or disgraceful act. Nor is it enough, on the other hand, that a possible and far-fetched construction may find an inoffensive meaning in the language. The test is whether, to the mind of an intelligent man, the tenor of the article and the language used naturally, import a criminal or disgraceful charge. In this case, the letter is censorious and fault-finding. Its object seems to have been to show the injuries the writer had received from those who had been near her late husband at the time of his death. In addition to what has been already stated, it alleged that money was contributed unnecessarily and misapplied; that the watch, the horse, and other articles of her husband had never been accounted for to her; that she was then trying to get even her little dog from the police; that her own private letters had been scattered among others indiscriminately, and returned to her after being in the hands of a prostitute; that in the hands of this prostitute are other relics sacred to a wife, which she can only obtain through a long litigation; that the police have called upon this woman, who refuses to give up to her anything belonging to her husband; and that she (this woman, this prostitute, who has done these things) is

understood to be under the patronage or protection of a Mr. More, of the Central railroad, who has also employed the orderly of her late husband. The suggestion that this language does not, of itself, impute a charge that Mr. More keeps this prostitute as his mistress, because she may be under his protection as a member of some reformatory institution managed by him, is extravagantly far-fetched, and is hostile to the whole tenor of the communication. The charge that she is under the patronage of Mr. More is the culmination of the accusations preceding, and was plainly intended to charge a criminal patronage or protection. Every man or woman who read it must have understood such to be its meaning.

Words which are, of themselves, actionable; which, in their natural construction, tend to injure the memory of the dead, or the reputation of one alive, and expose him to hatred, contempt or ridicule, need no averment that they were intended to impute such offense. It is only where the words do not, of themselves, fairly charge the offense, that extrinsic averments are necessary. *Cooper v. Greeley*, 1 Denio, 361; *Croswell v. Weed*, 25 Wend. 621. In my opinion, the complaint was sufficient, and the cause of action was fairly made out. I am for reversal and new trial.

All concur, LEONARD, C., not sitting.

Judgment reversed.

VAN RENSSELAER v. DOLE.

(1 Johnson's Cases, 279.—1800.)

ACTION for slander. The declaration charged defendant with speaking of plaintiff and others the following words: "John Keating is as damned a rascal as ever lived, and all who joined his party and the procession on the 4th day of July [meaning the said John Van Rensselaer and the party and procession in which said John Keating acted as captain on said 4th day of July] are a set of black-hearted highwaymen, robbers, and murderers." The words were differently charged, with some additional expressions, in the other counts, but were in substance the same. Plea the general issue. The words charged were proved to have been spoken by defendant. On the part of the defendant it appeared, that on the day previous to the speaking of the words, there had been a public procession to a church in Lansingburgh, where the parties resided; that Keating commanded an artillery company, which formed part of the procession, attended with music; that one Bird claimed one of the instruments of music, a bass-viol, and went to the

church to demand or take it, but it was refused, and retained by force; that upon this, an affray ensued, in which Bird received a dangerous wound. The conversation in which these words were spoken, was understood by the witnesses to relate to the transactions of the preceding day, and that the terms "highwaymen, robbers, and murderers" were used in reference to the treatment of Bird in withholding the bass-viol, and in stabbing him.

The judge was of opinion, that the words being spoken in relation to the transactions of the preceding day, and so understood, were thereby explained, and on that account not actionable. The jury found a verdict for plaintiff for \$50 damages, and 6 cents costs. Defendant moved for a new trial, on the ground that the verdict was contrary to law, and the evidence.

PER CURIAM. We agree in opinion with the judge at the trial. The words spoken by the defendant were clearly understood to apply to the transactions of the preceding day, and these were known not to amount to the charge which the words would otherwise import.¹ Let the verdict, therefore, be set aside; and, there being no question upon the evi-

¹ NOTE BY EDITOR OF SECOND EDITION OF JOHNSON'S CASES.—In *Christie v. Cowell*, Peak, N. P. C. 4, the words proved were, "he is a thief, for he has stolen my beer." It appeared in evidence that the defendant was a brewer, and that the plaintiff had lived with him as a servant; in the course of which service he had sold beer to different customers of the defendant, and received money for the same which he had not duly accounted for. Lord Kenyon directed the jury to consider whether these words were spoken in reference to the money received and unaccounted for by the plaintiff, or whether the defendant meant that the plaintiff had actually stolen beer; for, if they referred to the money not accounted for, that, being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus, if a man says to another, "You are a thief, for you stole my tree," it is not actionable, Cro. Jac. 114; Bull. N. P. p. 5;) for it shows he had a trespass, and not a felony, in his contemplation. Words may import a charge of felony, yet, if it appear from the subject-matter that the fact charged could not have happened, an action cannot be maintained. *Jackson v. Adams*, 2 Bing. N. C. 402, 2 Scott, 599; *Snag v. Gee*, 4 Coke, 16a; Steph. N. P. 2252, 2253. "Words apparently actionable may be explained by circumstances to have been intended and understood in an innocent sense. Thus, though the defendant should say, 'Thou art a murderer,' the words would not be actionable, if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, 'Thou art a murderer;' meaning a murderer of hares so killed. 4 Coke, 13. But the words, 'I think the business ought to have the most rigid inquiry, for he murdered his first wife,—that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death,'—were held to be actionable, as importing, at least, a charge of manslaughter; and, though the words were doubtful, the doubt would be cured by the finding of a jury that they were meant in that sense. *Ford v. Primrose*, 5 Dowl. & R. 288." 1 Starkie, Sland. & L. (Wend. Ed.) 99 *et seq.*

dence, the finding of the jury must be considered as contrary to law, and it is therefore, ordered that the costs abide the event of the suit.

Rule granted.

AVERMENT, COLLOQUIUM AND INNUENDO.

COOPER v. GREELEY.

(1 Denio, 347.—1845.)

DEMURRER to pleas, in an action for libel. The declaration, after the usual introductory matter, alleged in the first count, the publication by the defendants in the New York Tribune, of a certain false and malicious libel of and concerning the plaintiff, containing (*inter alia*) the following matter, which is set out with *innuendoes*, applying it to the plaintiff. “. . . He chooses to send none, but a suit for libel instead. . . . There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there.” An *innuendo* follows, averring the meaning to be that the plaintiff, in consequence of being known in the county of Otsego, was in bad repute there, and would not for that reason, like to bring a suit for libel in that county. The second count avers the publication by the defendants . . . of another alleged libel.

The defendants, besides the general issue, pleaded several special pleas. The plaintiff demurred to each of the special pleas, and the defendants joined in demurrer.

JEWETT, J. The first question presented is whether the first count of the declaration is good in substance. If not, it follows that the pleas interposed to that count need not be examined for the purpose of giving judgment on the demurrer; the rule being that where the count is so defective that a verdict will not cure it, the defendant on demurrer to his plea may fall back upon the count. *Miller v. Maxwell*, 16 Wend. 9. The defendants contend that the publication set forth in this count is not libellous. For the plaintiff it is insisted that it contains a charge that he was in bad repute in the county of Otsego, in consequence of being known in that county; and that on that account he would not like to bring a libel suit to trial there. The inquiry is, how is this publication to be understood? It is the duty of the court, in an action for a libel, to understand the publication in the same manner as others would

naturally do. "The construction which it behooves a court of justice to put on a publication which is alleged to be libellous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer." *Spencer v. Southwick*, 11 John. R. 592, per Van Buren, Senator; see also *Fidler v. Delavan*, 20 Wend. 57. It seems to me that the *innuendo* affixes the true meaning to the words. It may be admitted that the charge is not made in an open and direct manner. It seems to be ironical. But an imputation conveyed in that form is not the less actionable. The sting of the words in this case is in the imputation which it is alleged they convey, that the plaintiff had acquired so odious a reputation in Otsego county that, knowing enough of the influence of human action justly to apprehend danger to himself for that cause upon such a trial there, he would not dare to risk a trial in that county. Assuming this to be the true meaning of the publication, the inquiry follows—whether such language with such meaning and application is libellous within the rules of law applicable to the action for libel. The counsel for the defendants, although they did not admit on the argument that even such language could be considered libellous within their understanding of what they denominated the modern definition of libel, yet undertook to show by argument and authority that at the period when the late Chancellor Kent, and Chief Justice SPENCER, and their associates, held seats in this court, the rule in regard to what published words amounted to a libel was, more than forty years ago, greatly and unjustly extended. The definition of a libel submitted *arguendo* by the late General Hamilton, and adopted by the court in *The People v. Croswell*, 3 John. Cas. 354, and subsequently approved of by the court in *Steele v. Southwick*, 9 John. R. 215, is complained of as erroneous. The court in the case last cited said that "a writing published maliciously with a view to expose a person to contempt and ridicule is undoubtedly actionable; and what was said to this effect by the judges of the C. B. in *Villers v. Monsley*, 2 Wils. 403, is founded in law, justice and sound policy. The opinion of the court in the case of *Riggs v. Denniston*, 3 John. Cas. 205, was to the same effect; and the definition of a libel as given by Mr. Hamilton in the case of *The People v. Croswell*, 3 John. Cas. 354, is drawn with the utmost precision. It is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals. To allow the press to be the vehicle of malicious ridicule of private character, would soon deprave the moral taste of the community, and render the state of society miserable and barbarous." In the case of *Cropp v. Tilney*, 3 Salk. 226, HOLT, Ch. J., said, "scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be held of the plaintiff, or to make him contemptible, or ridiculous." Any written slander, though merely tending to render

the party subject to disgrace, ridicule, or contempt, is actionable, though it do not impute any definite crime punishable in the temporal courts. 3 Bl. Comm. Chitty's ed., 123, note 5.

But it is argued that the publication in question is not libellous, even admitting the definition of libel adopted by this court in *The People v. Croswell* and in *Steele v. Southwick*. It is denied that it is a censorious or a ridiculing writing; and although it is conceded that it reflects upon the plaintiff, it is said that it does not do so in a *severe* or censorious manner; and that it does not convey any sentiment or ridicule. The admission that the publication reflects upon the plaintiff, though qualified by the remark that it does not do so severely, yields the material point in controversy. The degree of censure or ridicule does not enter into the definition. "A censorious or ridiculing writing towards an individual" is defined to be a libel, "if made with a mischievous and malicious intent." "Censoriousness" is defined by Webster to be a "disposition to blame and condemn—the habit of censuring or reproaching." He defines the word "reflect," in his fifth subdivision, thus: "to bring reproach; to reflect on; to cast censure or reproach." It would seem to me that if a censorious writing made with a mischievous and malicious intent towards an individual is libellous, a writing made with a like intent reflecting upon an individual, whether more or less severely, would be none the less libellous. But I do not think that the rule requires any such aid. It is enough that we approve of the rule as settled, acted upon and undeviatingly adhered to by this court for about forty years. The objection that the *innuendo* is not justified by the language of the publication is one which can only be reached by special demurrer. The office of an *innuendo* is to apply the libel to the precedent matter; and it cannot be used to add to, enlarge, extend or change the sense of the previous words; and where the new matter stated in the *innuendo* is not necessary to support the action, it may be rejected as surplusage. 1 Chit. Pl. Day's ed. 382; 2 Dane's Ab. 596; *Thomas v. Croswell*, 7 John. R. 270; *Roberts v. Camden*, 9 East. 93. An *innuendo* may explain the meaning of words, though it cannot enlarge it without the aid of a *colloquium*; and a leading case on this point is where, in an action for slander, the words were, "He has burnt my barn," and it was held that the plaintiff could not say by way of *innuendo*, "my barn full of corn." But if the introduction to the count in the case had contained an *averment* that the defendant had a barn full of corn, and that in a discourse about it he spoke the words—then an *innuendo* stating the meaning of the words to be "a barn full of corn" would have been good. In such a case the *innuendo* would explain and apply the preceding parts of the declaration, by showing that the defendant's words were uttered in a conversation about a barn of the defendant's which was full of corn. In *Van Vechten v. Hopkins*, 5 John. R. 220, VAN NESS, J., explains the

meaning of an *avermment*, of a *colloquium* and of an *innuendo*. An *avermment* is to ascertain to the court that which is doubtfully expressed, and to add matter to make doubtful things clear. A *colloquium* shows that the words were spoken in relation to the matter of the *avermment*, and an *innuendo* is explanatory of the subject-matter sufficiently expressed before. The *colloquium* in this count was for the purpose of showing that the libel was published, as it is expressly alleged to have been, "of and concerning the plaintiff." An *innuendo* is an averment that such a one means such a particular person or that such a thing means such a particular thing; and with the introductory matter it forms a connected proposition by which the cognizance of the charge will be submitted to the jury, and the cause of action appear to the court. The *innuendo* in this case, which states the meaning of the publication to be that the plaintiff, in consequence of being known in the county of Otsego, was in bad repute there, and would not for that reason like to bring a suit for a libel in that county, appears to me to express the true meaning of the publication. The question whether the alleged libel was published of and concerning the plaintiff, and whether the true meaning of the words is such as is alleged in the *innuendo* or not, is a question of fact which belongs to the jury and not to the court to determine. *Van Vechten v. Hopkins*, 5 John. R. 221; *Goodrich v. Woolcot*, 3 Cowen, 231; *Peake v. Oldham*, Cowp. 275; 2 Bl. R. 961; *Dexter v. Taber*, 12 John. R. 239. It is well settled that where the slanderous charge may be collected from the words themselves or from the general scope of the publication, it is not necessary to make any averment as to circumstances to the supposed existence of which the words refer. So where the libellous meaning is apparent on the face of the declaration, *innuendoes* and *avermments* are unnecessary; but if introduced and not warranted by the subject-matter, they may be rejected as surplusage. *Croswell v. Weed*, 25 Wend. 621. The proposition of the defendant's counsel, that to render a publication actionable it must impute a crime, cannot be sustained. This rule has never been extended to libels in this State, nor has it been in England for the last one hundred and fifty years. The first action for a libel found in our books of reports is that of *Riggs v. Denniston*, before cited, which was decided in 1802. The late Chancellor, (then Mr. Justice KENT,) in delivering the opinion of this court, observed that the charges against the plaintiff were clearly libellous, because they threw contumely and contempt upon him in his character as a commissioner of bankruptcy—instead of holding them actionable as subjecting the plaintiff to the loss of his office. And such has been the doctrine of this court from that time to the present. In *Van Ness v. Hamilton*, before cited, Chief Justice SPENCER said: "It may however, be observed in the outset, that there exists a decided distinction between words spoken, and written slander. To maintain an action for

the former cause, the words must either have produced a temporal loss to the plaintiff, by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude. To maintain an action for a libel, it is not necessary that an indictable offence should be imputed to the plaintiff. If a libel holds a party up to public scorn, contempt and ridicule, it is actionable." It is insisted by the defendants' counsel, that in the early stages of the law of libel, there was no distinction between written and verbal slander, and that no action could then have been maintained for any words written for which an action could not be maintained if they were spoken. The case of *Thorley v. Lord Kerry*, 4 Taunt. 355, decided in the exchequer chamber in 1812, is, among other cases, relied on to sustain that position. That was an action for a libel charging the plaintiff with being a hypocrite, and with having used the cloak of religion for unworthy purposes. The plaintiff obtained a verdict and had judgment in the king's bench without argument, which was affirmed in the exchequer chamber upon error brought by the defendant. Sir J. MANSFIELD, C. J., in delivering the opinion of the court, stated that the words, had they merely been spoken, would not have been actionable; and while he disapproved of the distinction which he admitted had prevailed for more than a century past between written and spoken scandal, he said that as the rule and distinction had been so firmly established by some of the greatest names known to the law, and from a time at least as far back as the time of Charles the Second, he could not venture to lay down at that day that no action could be maintained for any words written for which an action could not be maintained if they were spoken. The rule is repeated in *Starkie on Slander*, 1 vol. by Wendell, p. 169. After a review of all the cases on the subject, this writer says: "Upon the whole it may be collected that any writings, pictures or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts by exposing him to disgrace and ridicule, are actionable without proof of special damage; in short, that an action lies for any false, malicious and personal imputation effected by such means and tending to alter the party's situation in society for the worse." The rule is the same and the like distinction prevails in Massachusetts. *Clark v. Binney*, 2 Pick. 113. Assuming that at an early period of the law, before the art of printing was invented or perfected, the distinction between words spoken and written slander was not recognized, the change may, I apprehend, be accounted for by the greater necessity for such a distinction in more modern times, when the tendency of the public press is so strong to licentiousness. It does

not appear to me that individual character is more than adequately protected by the legal remedies, civil and criminal, which the law as it has been established for the last century and a half, both in England and in this country, affords. If this court were competent to repudiate a distinction so well settled as that between written and spoken scandal, public policy would, in my opinion, interpose to prevent it.

* * * * *

The plaintiff is entitled to judgment upon the demurrer to the several pleas to the second count, and the defendants to judgment upon the demurrer to the pleas pleaded to the first count, with leave to each party to amend on the usual terms.

Judgment accordingly.

VICKERS V. STONEMAN.

(73 Michigan, 421.—1889.)

ERROR to circuit court in an action for slander. Judgment for plaintiff. Defendant brings error.

CHAMPLIN, J. This is an action on the case to recover damages for verbal slander. The declaration contains no matters of inducement, and no averment of collateral circumstances, but proceeds in two counts to set out the cause of action, as follows:

“On February 20, A. D. 1887, at Waverly, in the county of Van Buren aforesaid, in a certain discourse which the said defendant there and then had with the said plaintiff, in the presence and hearing of divers good and worthy persons, did speak, publish, and declare, to, of, and concerning the said plaintiff these false, scandalous, and defamatory words, to-wit:

“‘He (meaning the said plaintiff) poisoned my cattle; they were poisoned with Paris green; they were poisoned from a pail that had bran and poison in it, and Vickers (meaning the said plaintiff) put it there.’

“Thereby meaning and intending to charge that he, the said plaintiff, committed the crime of willfully and maliciously administering poison to the cattle of him, the said defendant, Edmund Stoneman, whereby said cattle were poisoned and killed.

“And whereas, also, the said defendant, with malice towards the said plaintiff aforesaid, afterwards, to-wit, on the same day and year, and at the same place aforesaid, in a certain other discourse which the said defendant then and there had, in the presence and hearing of divers

other good people, of and concerning the said plaintiff, did falsely and maliciously speak, publish, and declare, in the presence and hearing of those people, these other false, scandalous, malicious, and defamatory words, of and concerning the said plaintiff, to-wit:

“‘He (meaning the said plaintiff) poisoned my cattle; they were poisoned with Paris green; they were poisoned from a pail that had bran and poison in it, and Vickers (meaning the said plaintiff) put it there.’

“Thereby meaning and intending to charge that he, said plaintiff, committed the crime of willfully and maliciously administering poison to the cattle of him, the said defendant, whereby the said cattle were poisoned and killed.

“By reason of the speaking, publishing, and uttering of which said false, scandalous, malicious, and defamatory words the said plaintiff is greatly prejudiced in his good name, fame, and reputation.”

Then follows the claim for general damages. The plea was the general issue.

Upon the trial, the plaintiff having produced a witness by whom he proposed to prove the slanderous words, the defendant's counsel objected, for the reason that it was irrelevant and inadmissible under the pleadings; that the declaration sets out no cause of action, because the words charged in the declaration do not amount to a charge of crime, and are not actionable *per se*, and no special damages are claimed. The circuit judge overruled the objection and admitted the testimony. This is one of the main grounds of error relied on.

The words laid in the declaration as slanderous are not actionable in themselves. They do not charge a crime, as the statute requires the poisoning to be done willfully and maliciously in order to punish it as a felony. But the pleader seeks to bring the words charged within the offense created by the statute by the use of an *innuendo*, the office of which is to explain doubtful words and phrases, and annex to them their proper meaning. It is, however, well settled that an *innuendo* cannot extend the sense of the words used beyond their natural meaning, unless something is put upon the record by way of introductory matter, with which they can be connected; in which case, words which are equivocal, or ambiguous, or fall short in their natural sense of stating a slanderous charge, may have fixed to them a meaning extending beyond their ordinary import which renders them certain or defamatory by means of a proper *innuendo*. In this declaration there is nothing of an introductory character explaining the occasion, or stating circumstances which would connect the slanderous words with the relation of the parties, or the situation of the subject-matter, showing in what connection the slanderous words were used, and so by the use of the *innuendo* make their meaning certain. Thus it is laid down in 1 Chit. Pl. p. 422, in speaking of the office of the *innuendo*:

"It is only explanatory of some matter already expressed; it serves to *point out*, where there is precedent matter; but never for a new charge; it may *apply* what is already *expressed*, but cannot add to, or enlarge, or change the sense of the previous words."

It is also laid down in Starkie on Slander, at page 421, that—

"The most important rule of law relating to this species of averment is that its office is merely to explain by pointing out the defendant's allusion, and that it can in no case be allowed to introduce new matter; and the reason for this is a most substantial one, for were it otherwise there would be no sufficient and distinct averment of the existence of those facts which in point of law are essential to render the words actionable."

And after giving illustrations from adjudicated cases, upon page 422, this author says:

"An innuendo, therefore, cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain."

In this case it is the innuendo alone which charges the crime. It extends the meaning of the words used beyond their own import, and is directly within the decision of *Holt v. Scholefield*, 6 Term R. 691. And to the same effect are *Van Vechten v. Hopkins*, 5 Johns. 220; *McClaghry v. Wetmore*, 6 id. 83; *Thomas v. Crowell*, 7 id. 271; *Andrews v. Woodmansee*, 15 Wend. 232; *Miller v. Maxwell*, 16 id. 1; *Vaughan v. Havens*, 8 Johns. 190; *Beardsley v. Tappan*, 5 Blatchf. 588; *Patterson v. Edwards*, 7 Ill. 720; *Cramer v. Noonan*, 4 Wis. 231; *Taylor v. Kneeland*, 1 Doug. 67; *Bourreseau v. Journal Co.*, 63 Mich. 430, (30 N. W. Rep. 376), per MORSE, J. In Massachusetts, a more liberal rule of pleading prevails in actions of libel and slander, and in England, under the common-law procedure act of 1852, (15 & 16 Vict. chap. 76,) the declaration in this case would have been good. But under our practice the rules of pleading remain the same as they were in 1855; and under the decision of this Court then made in *Lewis v. Soule*, 3 Mich. 514, the declaration in this case is bad, and the objection to the introduction of testimony under it ought to have been sustained. As this disposes of the case at the present time, we do not think it advisable to discuss the other errors assigned.

The judgment will be reversed, and a new trial ordered.¹

¹ Compare *Keller v. Dean*, 57 App. Div. 7.

REPETITION.**McPHERSON v. DANIELS.**

(10 Barnewall & Cresswell, 263.—1829.)

ACTION for slander. Defendant pleaded that when he uttered the same, he told his hearers the name of the author. Demurrer.

LITTLEDALE, J. For the reasons already given by my Brother Bayley, I think that the plea is bad; but with reference to the resolution in Lord Northampton's case, I will say a few words. That resolution has been frequently referred to within the last thirty years, and though not expressly overruled has been generally disapproved of. The latter part of that resolution is extra-judicial, for it was not necessary to come to any resolution respecting private slander in the Star Chamber. It is somewhat inconsistent with the third resolution, where it is laid down, "that if one hear false and horrible rumors, either of the king or of any of the grandees, it is not lawful for him to relate to others that he heard J. S. say such false and horrible words, for if it should be lawful, by this means *they may be published generally*." It was resolved then, that in the case of *scandalum magnatum* it was not lawful to repeat slander, because, if it was, it might circulate generally. Now the same inconvenience, viz. the general publication of slander, though differing in degree, would follow from the repetition of slander in either case. The fourth resolution, however, in terms, perhaps does not go the length of saying that a defendant may justify the repetition of slander generally, but only that he may justify under certain circumstances. Assuming that it imports that a defendant may justify the repetition of slander generally, by showing that he named his original author, I think that it is not law.

The declaration, which contains a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words, falsely and maliciously spoken, as in this case, are actionable in themselves, the law *prima facie* presumes a consequent damage without proof. In other cases actual damage must be proved. To constitute a good defence, therefore, to such an action, where the publication of the slander is not intended to be denied, the defendant must negative the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or show that the plaintiff is not entitled to recover damages. It is competent to a defendant, upon the

general issue, to show that the words were not spoken maliciously; by proving that they were spoken on an occasion, or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice, (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. Now, a defendant, by showing that he stated at the time when he published slanderous matter of a plaintiff, that he heard it from a third person does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion, or under circumstances which the law, on grounds of public policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover, damages. As great an injury may accrue from the wrongful repetition, as from the first publication of slander, the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant; and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, nor does it show that the plaintiff is not entitled to recover damages.

*Judgment for plaintiff.*¹

¹ Opinions by Bayley and Parke, JJ., omitted. "In the case of *Davis v. Lewis*, 7 Term Rep. 17, Lord Kenyon observed, that if a person say that such particular man (naming him) told him certain slander, and that man did in fact tell him so, it is a good defense to an action of slander. There was a similar *dictum* of the judges, in the *Earl of Northampton's Case*, 12 Co. 132, but in neither of these cases was this the point in judgment." *Dole v. Lyon*, 10 Johns. Rep. 447, 449. Such justification was doubted in *Lewis v. Walter*, 4 B. & A. 605, and rejected in *DeCrespigny v. Wellesley*, 5 Bing. 392.

"It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition,

JUSTIFICATION: TRUTH.**JOANNES V. JENNINGS.**

(6 Thompson & Cook, 138.—1875.)

(Reported in 4 Hun, 66, without opinion.)

APPEAL by the defendants from a judgment in favor of the plaintiff entered upon the verdict of a jury and from an order denying a motion for a new trial, in an action to recover damages for a libel alleged to have been published of and concerning the plaintiff in the New York Times.

DAVIS, P. J. At the close of the case a certificate of the clerk of the Circuit Court is inserted, which contains an entry in these words: "Motion for a new trial on the judge's minutes denied." No grounds upon which the motion was made are stated; and it does not appear whether it was made on questions of law or of fact, or for excessive damages, or on some alleged irregularity. It is not error to deny a general motion which states no ground whatever; nor ought this court, where such a motion is made, to entertain questions not suggested to the court below, but raised here for the first time. The practice that was pursued in this case is, however, very common. It is, nevertheless, wrong, because of its injustice to the judge before whom the case was tried, who is entitled to have the grounds of such a motion specifically pointed out, so that he may have the opportunity to correct any error that, on

without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. (Newall on Defamation, 245; Moak's Underhill on Torts, 145; *M'Gregor v. Thwaites*, 3 B. & C. 35.) The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. (*Ward v. Weeks*, 7 Bing. 211; *Olmsted v. Brown*, 12 Barb. 657.) The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and, therefore, the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by the repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander." *Schoepflin v. Coffey*, 162 N. Y. 12, 17.

reflection, may appear to have occurred, or to consider the alleged irregularity or the impropriety of the verdict on any ground. It is also unjust to the successful party, because no opportunity is given him to know on what ground the motion will be attempted to be sustained on appeal. The existing practice ought to be corrected.

In this case, however, we have looked into the evidence, and are satisfied that there is no reason for disturbing the verdict on any question of fact, nor because of excessive damages. The jury doubtless found, and were quite justified in doing so, that the publication, so far as submitted to them, was made for the purpose of the annoyance and ridicule of the plaintiff. The damages, therefore, were in their sound discretion; and if they concluded that when a public journal of acknowledged influence and character descends to such an attack, the injury may be measured in some degree by the strength of the assailant, the court are not at liberty, for that reason, to interfere. The defendants have no reason to complain of the manner in which the facts of the case were submitted to the jury by the learned judge. He brought their attention to the only question which, in the absence of proof of express malice in publishing the affidavit, was proper for their consideration, and he submitted that question to them with great clearness and equal fairness.

None of the exceptions to the charge, or to the refusals to charge as requested, seem to call for consideration except one.

At the close of the charge the defendants' counsel asked the court to charge that, if the statements preceding the affidavits, which do not flow from the affidavit and the speech itself, be true, "then no action will lie upon them." In response to this request the court charged: "If you find from the evidence that even although the statements which precede the affidavit do not legitimately flow from the affidavit, still they were true; then the defendants would be entitled to a verdict, *unless you find they were published for a malicious purpose.*"

The learned judge doubtless had in his mind the provision of the constitution, under which, in a criminal case, this charge would have been correct. Section 8 of article 1 of our State constitution provides, that "In all criminal prosecutions or indictments for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

This provision it will be observed is limited by its express terms to *criminal* prosecutions and indictments. The former constitution did not, in this connection, contain the word "criminal," and it was thought by learned and able jurists that the provision of that constitution was applicable to civil actions for libel. See *Dolloway v. Turrill*, 26 Wend. 383, and opinions of Senators Root and Verplanck, pages 399-402. All

doubt, however, was removed by the insertion of the word "criminal," as it now appears in the constitution of 1846.

In civil actions where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar to the suit; and in such case the motives with which the publication was made are not material.

This was so laid down both by the Supreme Court and by the Court of Errors in the celebrated case of *Root v. King*, 7 Cow. 613; S. C., 4 Wend. 113. The rule is the same in slander; and as it was tersely stated by BRONSON, J., in *Baum v. Clause*, 5 Hill, 196: "Our laws allow a man to speak the truth although it be done maliciously." The defendants had pleaded in justification the truth of the statements which preceded the affidavit, and had given evidence which justified the submission of the question of their truth to the jury. The charge allowed the jury even if they found the statements to be true, still if they also found that they were "published for a malicious purpose," to give the plaintiff a verdict for damages. We cannot, to a legal certainty, see that the verdict was not given upon such findings. Hence there was a fatal error which entitles the defendants to a new trial.

The judgment must be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed and new trial ordered.

HUTCHINS V. PAGE.

(75 New Hampshire, 215.—1909.)

LIBEL. Plaintiff's counsel, in his opening, stated that he expected to prove that defendant, being tax collector for the city of Portsmouth and having an overdue tax against plaintiff, advertised the property for sale by posting the notices required by statute, and also by publishing like notices in two newspapers. These publications were alleged to have been made maliciously and for no purpose except to injure plaintiff. Upon this statement a nonsuit was ordered, subject to exception.

PEASLEE, J. However the law may be elsewhere, it is well settled in this State that the truth is not always a defense to an action on the case to recover damages for the publication of a libel. *State v. Burnham*, 9 N. H. 34. The rule there suggested, that if the occasion be lawful the motive for the publication is immaterial, if the truth of the charge be established, was materially modified when a case arose in which the question was directly in issue. "It seems to us that in order to settle whether the occasion was lawful we must generally inquire into the

motives of the publisher. There may be some cases where the occasion renders, not only the motive, but the truth, of the communication immaterial. Thus it may be the better rule that no relevant statement made by a witness or by counsel in the course of a trial is actionable, even though false and malicious. See *Revis v. Smith*, 18 Com. Bench. 126. But in the great majority of instances, and certainly in the present case, the lawfulness of the occasion depends upon the good faith and real purpose of the publisher. Most of what are called 'privileged communications' are 'conditionally,' not 'absolutely,' privileged. 'The question is one of good faith,' or motive, and can be settled only by a jury. A court cannot rule that a communication is privileged without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth." *Palmer v. Concord*, 48 N. H. 211, 217; *Carpenter v. Bailey*, 53 N. H. 590, 594; *Id.*, 56 N. H. 283, 290.

Under this rule the plaintiff states a case. While it was the defendant's duty to publish the fact that the plaintiff had failed to pay the taxes assessed against him, "by posting advertisements thereof in two or more public places in the town" (Pub. St. 1901, c. 60, § 14), it was not his duty to otherwise publish the fact unless he thought such publication was essential to the success of the tax sale. If he did not so believe, but, on the contrary, used this occasion to maliciously proclaim in a public manner that the plaintiff had not paid his taxes, there is neither legal nor ethical reason why an action should not lie for the damage caused by the malicious and unwarranted act.

The claim that the defendant is exonerated by the provision that he shall not be liable "for any cause whatever except his own official misconduct" (Pub. St., 1901, c. 60, § 16) cannot be sustained. The misconduct here charged is "his own." He can no more use the statutory power to advertise as a cloak for a malicious assault upon the plaintiff's character than he could make the power to arrest a commission for the infliction of bodily chastisement.

Exception sustained. All concurred.

CASTLE V. HOUSTON.

(19 Kansas, 417.—1877.)

HORTON, C. J. This was an action commenced in the district court of Leavenworth county to recover damages for libel. The petition alleges, in substance, that the defendant was editor, proprietor, and publisher of the Leavenworth Daily Commercial, a newspaper printed in the city of Leavenworth, and that on the 20th of January, 1875, there was published in said paper, of and concerning the plaintiff, a certain false and malicious libel, in words as follows, to-wit: "The insurance department of our state will in all probability be subject to a thorough investigation, as a bill has already been introduced into the senate to investigate. This is right. Every insurance company in the state is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same. There is a cadaverous looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with, and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then, doubtless, the Northwestern Life would be glad to hear from him, as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played-out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success. Jack."

In answer to the petition, defendant set up three defenses: First, an admission that the article complained of was published in defendant's paper of and concerning the plaintiff, but denied that the same was published with malice; second, that defendant had no personal knowledge of the publication of the article at the time of its publication, with the further allegation that the several matters and things in the article complained of as defamatory were true, and published for justifiable ends and purposes; and, third, a general denial. To the answer plaintiff filed a reply, denying generally, save and except what was admitted, all the allegations in the answer. When the case came on for trial, it was submitted to a jury, and plaintiff obtained a verdict of \$1,250; whereupon defendant gave notice of motion for a new trial, which was filed, and, after being argued, was by the court sustained, upon the ground that the court had erred in its instructions to the jury. The plaintiff excepted, and has brought the case here for review.

It appears from the record that the court below granted the motion for a new trial on the ground that the jury was misdirected by the following instructions, viz.: "The fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages. It is not a defense simply to show the truth of the matter published, but the party must go further, and show that it was not only true, but that he acted from good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly, for good purposes and justifiable ends, and what he says is true, then he is to be excused or acquitted."

In this condition of the case, we must first inquire whether the instructions above set forth were improperly given on the trial. If erroneous as a statement of the law controlling the case, they certainly may have misled the jury. If correct in principle, and applicable under the issues presented, the court erred in granting a new trial, for the reason given. An examination of this question will lead to a brief review of the law of libel in both criminal and civil prosecutions, so far as to consider and determine when a defendant may be permitted to give the truth in evidence as a full justification of alleged libelous matter.

It was at one time the rule of the common law that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth, the greater the libel." This doctrine was based upon the theory that, where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party aggrieved ought to complain for an injury to the settled course of law; and to neglect this duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule without an opportunity to show by the judgment of a court that he was innocent, was libelous; and, if the matter charged was in fact true (thereby insuring social ostracism), the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of the press consisted in the right to publish, with impunity, truth with good motives and for justifiable ends, whether it respected government, magistracy,

or individuals. It certainly was derived from the polluted source of the star chamber, and was considered at the time an innovation, but, like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the state of New York, this principle of law was recognized and asserted in the case of *People v. Crosswell*. In that case the defendant was prosecuted for libel for having published in his newspaper at Hudson, in that state, called the "Wasp," the charge against Thomas Jefferson, then president, that he (Jefferson) paid Callender for calling Washington a traitor, a robber, and a perjurer. The defendant, through his counsel, Alexander Hamilton, applied to the judge at the circuit to put off the trial to obtain the testimony of Callender to prove the publication true. Lewis, C. J., presiding, denied the motion, because the testimony was inadmissible, as the truth of the facts charged as libelous did not amount to a complete justification. 3 Johns. Cas. 337. This case attracted so much attention, that after a verdict of guilty had been rendered, and while the case was in the courts of New York on a motion for a new trial, the legislature of that state passed a law providing that, in every prosecution for writing or publishing any libel, it should be lawful for the defendant upon the trial to give in evidence, in his defense, the truth of the matter contained in the publication charged as libelous, and that such evidence should not be a justification, unless it should be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends. Since the adoption of the New York statute declaratory of the law of libel in criminal actions, nearly every state in the Union has made the subject a matter of constitutional or statutory provision. The wise framers of our own constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surrounding the settlement of the territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the star chamber of England, and thereafter generally understood and interpreted, by providing, in section 11 of our bill of rights, that "the liberty of the press shall be inviolate, and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and, in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

Nevertheless these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth, when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the accused should be acquitted, not on proof of

the charge alone, but it should further appear the publication was made for justifiable ends. Following the intendment of the constitution, the legislature afterwards provided, in the act relating to crimes and punishments, that, "in all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury; and if it appears to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted." Section 272, Gen. St. p. 376.

But the law-makers, jealous of the liberty of the press, and fearing the construction of the law by the courts in such prosecution, further provided, in a succeeding section of the same act, that, "in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact." Section 275, Gen. St. p. 377.

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of *King v. Root*, 4 Wend. 114, 139, Chancellor Walworth clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was that in criminal prosecutions the defendant was not permitted to give the truth in evidence; and yet the jury were required to imply malice. But in civil cases the defendant was permitted to give the truth in evidence as a full justification." Such was declared to be the law by the judges at the time that bill was under discussion in parliament, and there has never been any alteration of the law in England on this subject in civil suits. The case of *King v. Root*, *supra*, was originally tried at one of the circuits in New York before Hon. Samuel R. Betts. The defendants, King and Verplanck, were editors of the New York American, printed in the city of New York in 1824. These editors published concerning one Root, lieutenant governor of that state, among other things, that in August of that year he addressed the state senate, then in session, "while blind with passion and rum, when he was unwashed, unshaven, haggard, with tobacco juice trickling from the corners of his mouth, and in a condition outraging all order, decency, and forbearance." Root brought a civil action to recover damages for the alleged libel, and the defendants admitted the publication, and pleaded the truth as justification. The trial judge instructed the jury, "if the defendants had only published the truth, they had an unquestionable right to do that, and they must be acquitted."

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil

practices of a delinquent. He says that it is a *damnum absque injuria*, intimating that the act of the defendant who justifies a libelous publication does not constitute a wrong, in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. 3 Bl. Comm. 125. This is illogical; and Starkie bases this exemption on the better reason that, in such instances, the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief. His original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. Folkard's Starkie, Sland. & L. (Am. Ed.) § 692.

* * * * *

If it be contended that, within the provision of the constitution, the proof of the truth as a defense in a civil action is no justification, except it be also made to appear that the publication was had for justifiable ends, we answer that, in view of the rule of law applicable in such cases at the time of the adoption of the state constitution, we do not think such a construction proper. It is not in accordance with the spirit or the letter of that instrument. It provides that in civil and criminal actions the truth may be given in evidence to the jury, and, where an accused is on trial,—that is, where a person charged with a crime for the publication of alleged libelous matter is being tried,—he is not to be acquitted, except the publication is true, and the same was published for justifiable ends. In that event only is the accused party entitled to an acquittal. The word “accused” is used in the constitution, and, an “accused” being one who is charged with a crime or misdemeanor, it cannot well be said to apply to a defendant in a civil action. If the motive of the party publishing the truth is to be considered in civil suits, under the constitution, then this section quoted, instead of operating to the protection of individuals charged in personal actions for damages for the publication of alleged libelous matter, as was doubtless intended by the framers of the constitution, would have the effect to hold parties responsible in cases where at the common law they would be entitled to a verdict. The constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the right to pass any act not violative of the state or federal constitutions. The object of section 11 of the bill of rights was to prevent the passage of any law in Kansas restraining or abridging the liberty of speech and of the press. By it the harsh rule of the common law, as generally recognized in libel

prosecutions, was greatly modified; but we cannot seriously think that it was intended thereby to abrogate that principle of the common law, sustained and upheld under the exacting and arbitrary construction of libels in England, that proof of the truth is a complete justification in all civil actions. Nor can we believe that thereby it was intended that the legislative power of the state was forever deprived of conferring the right upon a defendant in a civil action of libel to plead the truth of the words charged as a full and complete defense. To assert otherwise would be to assert that the constitution abridged and curtailed the liberty of the press in civil actions more than the common law,—more than the provisions of the constitutions of other states. The modification of the common law by the constitution we construe in favor of the liberty of the press, not against it. The constitution of Rhode Island provides, “in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged:” And it was held in that state that the truth of the charge is a good defense in a civil action for libel. *Perry v. Man*, 1 R. I. 263. From our review of the authorities, the provision of our constitution, the Civil and Criminal Codes, we deduce these important principles: First. In all criminal prosecutions the truth of the libel is no defense unless it was for public benefit that the matters charged should be published; or, in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine, at their discretion, the law and the fact. Second. In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law.

Under this view, the court below misdirected the jury in a very material point, and properly, on attention being again called to the matter by a motion for a new trial, granted such motion, and set the case again for hearing. The instructions given might have been applicable in a criminal proceeding, where the motive of the publication is important, and where the jury have a right to determine the law as well as the fact; but were erroneous in a civil action, where the facts charged were proven in justification. The instructions assumed that the truth is not a full and complete defense unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies. *Root v. King*, 7 Cow. 613, 632; *Townsh. Sland. & L.* § 211; *Foss v. Hildreth*, 10 Allen, 76; *Baum v. Clause*, 5 Hill, 196; 1 Starkie, *Sland. & L.* 229; *Rayne v. Taylor*, 14 La. Ann. 406.

* * * * *

The order of the district court setting aside the verdict of the jury in the case, and granting a new trial, is affirmed.

All concurred.

SAME: MUST BE AS BROAD AS CHARGE.

McKINLEY v. ROB.

(20 Johnson, 351.—1823.)

\ **ACTION for slander.**

The declaration charged that the defendant, on June 15, 1821, in a certain conversation, falsely, etc., spoke of and concerning the plaintiff, and of and concerning the truth of the evidence given by the plaintiff, on a complaint made by him, on oath, before a justice of the peace, on March 20, 1820, against one Slyter, for perjury, etc., the following words: "He (meaning the plaintiff) had sworn false;" (meaning that the plaintiff had sworn false, and committed perjury, in giving his evidence before the justice.) The defendant pleaded the general issue, with notice of justification.

The defendant's counsel, in opening his defense to the jury, among other things, stated, that if the jury, from the evidence to be introduced on the part of the defendant, should be satisfied, that the evidence given by the plaintiff, before the justice, was not strictly and literally true, though the plaintiff might have testified through misapprehension or mistake, the defendant's justification would be made out, and he be entitled to a verdict. The judge ruled that, in his opinion, the defendant would fail in making out a justification, unless he proved, that the plaintiff wilfully swore false; and in his charge to the jury, the judge, among other things, stated, that the defendant, in order to make out a justification, was bound to prove, that the plaintiff had, in giving his evidence before the justice, wilfully and corruptly sworn false; that if the plaintiff, in giving that evidence, had, by mistake, misrepresented a fact, it was no justification to the defendant; and that it required the same evidence to sustain such a justification, as to maintain an indictment for perjury. The jury found a verdict for the plaintiff, for \$500 damages.

A motion was made to set aside the verdict, and for a new trial.

WOODWORTH, J. The day stated in the declaration is not material. There was no record of the complaint; and if there had been, the declaration does not profess to set it out according to its tenor, or *in haec verba*, but refers to it as matter of description, for the purpose of informing

the defendant that the words referred to a *complaint* previously made. In *Brooks v. Bemiss*, 8 Johns. Rep. 455, the defendant gave notice that he would offer in evidence a record of the trial of an indictment, of the term of June, 1810. When produced, it appeared to be 1809, and the court held that the variance was not material.

There is no foundation for the second point, for the plaintiff did prove the words to have been spoken in reference to the oath of the plaintiff on the complaint. The declaration avers, that the words were spoken concerning the evidence given on the complaint, which I understand as the evidence given when application was made to the justice, and upon which the warrant issued; it says nothing respecting the subsequent examination. The case states, "*that the plaintiff proved the words as laid;*" and if so, he must have proved, that the words spoken had reference to the *complaint*. Whether the plaintiff gave testimony on the examination of Slyter or not, is immaterial. The plaintiff does not charge the speaking of words relating to that, nor does it appear that any proof was given of the speaking of words by the defendant relating to the evidence given on the examination.

The charge to the jury was correct. The words spoken, in judgment of law, imputed the crime of perjury, inasmuch as they alleged the false swearing to have been before a magistrate, having competent authority to administer the oath, and take cognizance of the complaint. There was no qualification or explanation by the defendant, at the time, that the plaintiff, through misapprehension or mistake, may have sworn false. It was too late, at the trial, to say, in substance, "The plaintiff has sworn false, but it may have proceeded from mistake, and may not have been corrupt. I did not intend by the words more than this." The defense, to be available, must be as broad as the charge; the evidence relied on was no justification. When a defendant has made a charge, that clearly imputes a crime, he cannot, afterwards, be permitted to say, I did not intend what my words legally imply. The intent must be collected from the expressions used, when they have a certain and definite meaning. The jury cannot rightfully indulge in conjectures that are not warranted by the legal import of the words spoken. But if it is doubtful whether the words impute a crime, or may be satisfied by ascribing to them a meaning which renders them not actionable, then the intent may become a fair subject of inquiry before a jury. This distinction is recognized by LORD ELLENBOROUGH in 3 Camp. Rep. 460, and by this court in 12 Johns. Rep. 257. The charge of the judge would not have been correct, if the principle of these cases had been applied to the words spoken by the defendant. We are of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

*JUSTIFICATION: PRIVILEGE.**(a) ABSOLUTE.*

SCOTT V. STANSFIELD.

(L. R. 3 Exchequer, 220.—1868.)

PLAINTIFF declared that the defendant published of him, in his business as a scrivener, "You are a harpy, preying on the vitals of the poor." The defendant pleaded that he did so as a judge in the trial of a case. The plaintiff replied that the matter was false, and was immaterial, irrelevant and impertinent. Demurrer and joinder.

KELLY, C. B. I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge in the court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of LORD COKE to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the Superior Courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a

judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

*Judgment for the defendant.*¹

PERKINS V. MITCHELL.

(31 Barbour, 461.—1860.)

By the Court, EMOTT, J. . . .

The complaint states that the plaintiff at the time of the publication was a merchant; that the defendant, on the 4th of December, 1858, published of the plaintiff a false, malicious and defamatory libel, which is then set out at length. It consisted of a certificate signed by the defendant and another person, stating that they, being physicians, "have examined and are acquainted with the plaintiff's health and mental condition, and are of opinion that he is insane and a fit person to be sent to the lunatic asylum." To this is added an affidavit signed by the defendant alone, to the effect that he is acquainted with the plaintiff, and that the plaintiff "is disordered in his senses, and has been so for some time past;" and that he is "so disordered in his senses as to endanger the persons of the people, if left unrestrained, and that it is dangerous to permit him longer to go at large." The complaint proceeds to allege that the defendant "presented the said certificate and affidavit to the said justices of the peace," meaning, I presume, two persons whose names appear at the foot of the affidavit as having administered the oath to the defendant; that they, in consequence thereof, issued a warrant by which the plaintiff was forcibly taken and confined in the lunatic asylum for four days. The complaint concludes with the ordinary allegation of damage to the plaintiff from the publication of the libel, both in his character and his business. The defendant demurred to this complaint; his demurrer was overruled in the city court, and he has appealed to this court from the order overruling it.

It is clearly libelous to publish of another that he is "insane and a fit person to be sent to the lunatic asylum;" or that "he is so disordered

¹ Opinions by Martin, Bramwell and Channell, B. B., omitted.

in his senses as to endanger the persons of other people, if left unrestrained, and that it is dangerous to permit him longer to go at large." There is no definition of libel which has ever been received by the courts which will not include such a charge. It is a censorious and ridiculing writing, and if untrue it will ordinarily be inferred to have been made with a mischievous and malicious intent towards the individual named; which are the conditions of Gen. Hamilton's celebrated definition in the *Croswell case*, 3 John. Cas. 337, 354; 9 John. 215. It sets the plaintiff in an odious light, and exposes him to public contempt and aversion, which is Blackstone's rule. 3 Com. 125; 4 id. 150. It is unnecessary to multiply definitions; upon this point, the case is clear. See Lord Coke in 5 Rep. 125; Ld. Holt, 3 Salk. 226; and 1 Starkie on Slander, 153. Nor is the libelous character of the language destroyed or diminished by the fact that the defendant is a physician, and makes the statement as a professional opinion. It is rather an aggravation of such a charge that it is backed by the professional skill and authority of a medical man. Can it be doubted that if a physician should, without cause or justification, wantonly write and publish a statement that a man was insane, dangerous and unfit to be at large, and that such was his opinion as a medical man, he would be liable to an action for a libel. There is no rule of law which will protect an individual in the utterance of libelous charges against another, merely because the utterer occupies a professional position and possesses professional skill and experience. To give to a statement made by a physician, which would otherwise be criminary and libelous, a privileged character, he must not only utter it as a medical man, but it must be made in the discharge of a duty, and to a person who has or is engaged in a corresponding duty in reference to the subject matter. *Harrison v. Bush*, 32 Eng. L. and E. Rep. 173; *Van Wyck v. Aspinwall*, 17 N. Y. 190.

It is also erroneous to suppose that a complaint alleging such a publication as that under consideration without lawful authority or justification is defective unless it aver special damage to the plaintiff. We do not purpose to consider how far the present complaint contains averments of special damage, or to what extent the arrest and detention of the plaintiff can be pleaded or proved as damages resulting from the publication of the libel. It is sufficient to say that the only cases in which it is necessary in order to sustain an action for defamation, to allege the manner in which the publication has injured the plaintiff, are cases where it is of such a character that the court cannot see that its tendency and effect would be to defame or degrade the plaintiff, or to render him odious or contemptible. This is the rule given by Chancellor Walworth in the court of errors, in *Cooper v. Stone*, 2 Denio, 299, and recognized by all the cases. The obvious import and effect of such a charge as that now before us is degrading and injurious, and we need

no averments to point out its tendency. We must therefore look to another part of the case to sustain this demurrer.

The question upon which the case must ultimately turn is whether the affidavit and certificate of which the plaintiff complains were privileged communications. The defendant contends that they were, and that the facts and circumstances which confer upon them that character sufficiently appear in the complaint. It was upon this ground that the demurrer was mainly, if not entirely, founded.

The authorities, both in England and in the courts of this state, clearly recognize two classes of privileged communications. In one the party is protected from civil or criminal responsibility for his statements, whether spoken or written, although untrue, unless he is proved to have been actuated by a malicious design in making them. To this class of cases belong complaints preferred in the proper quarter against public officers; statements in regard to the character of a servant, given by a master upon inquiry; confidential communications upon matters of business, between parties having a mutual interest; statements made in the discharge of a public or official duty; and other publications of a similar nature. The occasion of the speech or writing, and the position of the person by whom it is uttered, in these instances, repel the presumption or inference of malice which the law justly and wisely attaches to a false and injurious accusation where it is gratuitously made. But the party injured may nevertheless prove, if he is able to do so, that the charge which has been published even upon such an occasion, was not only false in fact, but malicious in motive. If he can establish express malice he may recover as in other cases, notwithstanding the conditional privilege. See *Thorn v. Blanchard*, 5 John. 508; *O'Donaghue v. McGovern*, 23 Wend. 26; *Vanderzee v. McGregor*, 12 Wend. 545; *Somerville v. Hawkins*, 3 Eng. L. and E. Rep. 503; *Harrison v. Bush*, 32 id. 173; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Lewis v. Chapman*, 16 id. 369. In *White v. Nicholas*, 3 How. 266, 284, Mr. Justice DANIEL endeavors to show that this is the extent to which words spoken or written are protected by any occasion, and that there is no case in which an action for slander or libel will not lie for a false and criminary statement, however or whenever made, provided the person making it is shown to have been actuated by express malice towards the party accused. The case in which this opinion was delivered was an action for a libel contained in a communication to the secretary of the treasury, asking the removal of a collector of customs. It was therefore a case belonging to the class just referred to, and in which the privilege of the party only will protect him for an unfounded statement if his motive be honest and not malicious. But the reasoning of Judge DANIEL's opinion, and the propositions which he deduces where he goes beyond the case in hand, are clearly unsustained by principle or authority.

There is another class of communications to which much greater immunity is attached in the law, and for which a party is protected from any action for damages on account of their defamatory character or effect. These are words spoken or written in the due course of parliamentary or judicial proceedings. In the case of judicial proceedings, which is all that is material now, words spoken or written by a party, by counsel, by a judge, a juror or a witness, although false, defamatory and malicious, are not actionable, if they were uttered in the due course of the proceeding, in the discharge of a duty, or the prosecution or defense of a right, and were pertinent and material to the matter in hand.¹ It is unquestionable that a person who institutes a groundless proceeding, whether civil or criminal, against another, upon false or defamatory charges, is liable to an action for the injury he occasions. But that the action must be for the malicious complaint, indictment or action, and not for the words. See COWEN, J., in *O'Donaghue v. McGovern*, 23 Wend. 26; Starkie on Slander, 193. This doctrine is also to be found in the chancellor's opinion in *Hastings v. Lush*, in the court of errors, 22 Wend. 410, and the distinction between this and the other class of privileged cases is very clearly pointed out by him. Where the words are uttered by counsel, or a witness, or a judge, the protection is, if possible, yet more absolute. Unless such persons can be connected directly with the prosecution, as instigating or promoting it with malicious motives, they are entitled to entire immunity for what they say and do in their several places, and in the discharge of their respective duties in a cause. There is but one limitation to their protection, and that is that they should not go beyond the cause and the parties, or what is pertinent and material to them. *Ring v. Wheeler*, 7 Cowen, 725, and *Gilbert v. The People*, 1 Denio, 41, are instances of the application both of the rule and its limitation; and in the latter case Judge BEARDS-

¹ "Words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. . . . And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings, with which a party, or counsel who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved." *Hoar v. Wood*, 3 Met. 193.

"The law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive with which they are used; but that such privilege does not extend to matter, having no materiality or pertinency to such questions." *Marsh v. Ellsworth*, 50 N. Y. 309.

LEY defines the doctrine with precision, and recognizes the absolute and unqualified protection of what is said or written in a judicial proceeding, if it be pertinent and material, against an action and against the allegation or proof of malice in the party uttering it. In the case of witnesses who are compellable to appear and to testify, it would indeed be intolerable that their motives and feelings should be scrutinized, and they subjected to liability for statements which they could not avoid making under the direction of the court before whom they appear. Persons testifying in a court of justice are not liable to an action for any statements which they make under the examination to which they are subjected, and in reply to questions permitted by the court or magistrate.

The principles which have now been stated are sustained by the whole series of authorities, from the earliest to the latest. *Lake v. King*, 1 Saund. 120, 132, is a case where the proceeding was in parliament, and although somewhat questioned in some later cases, the decision was recognized as law by LORD MANSFIELD, in *Astley v. Young*, 2 Burr. 810. That was a case of an alleged libel contained in an affidavit in a proceeding in the king's bench. LORD MANSFIELD put it to the counsel to "show that a matter given in evidence in a court of justice may be prosecuted in a civil action as a libel," and judgment was given for the defendant on demurrer, on the ground of the privileged character of the publication. In the celebrated case of *Rex v. Baillie*, 21 State Trials, 1, which was also before LORD MANSFIELD, Mr. Erskine, in his memorable speech, asserted the rule broadly. "A man," he said, "cannot be guilty of a libel, who presents grievances before a competent jurisdiction, although the facts he presents should be false; he may indeed be indicted for a malicious prosecution, and even then a probable cause would protect him, but he can by no construction be considered as a libeler." LORD MANSFIELD, in giving judgment, recognizes "the distinction taken at the bar as sound and well founded," and adds, "in a proceeding in a court of justice of the parties nothing can be a libel;" and alluding to an affidavit in a judicial proceeding, as in the case of *Astley v. Young*, which he cites, he says, "it was not the subject matter of an action or a prosecution, if it was really so used in the course of a judicial proceeding." There is a case of *Hodgson v. Scarlett*, reported in 1 B. & Ald. 232, which was an action against that noted barrister, afterwards LORD CHIEF BARON ABINGER, for words spoken in an address to the jury in the trial of a cause. In this case the opinions of some of the judges are somewhat qualified and hesitating, as if proof of express malice would take away the privilege. But the point was not distinctly presented, and it may be inferred, I think, from the expressions used by these judges, that proof of the pertinency of a statement used on such an occasion would rebut any proof of malice. The term

maliciously is used in a legal sense, as implying that the party had traveled out of his way and his duty, from private enmity, to asperse another whose character was in nowise concerned. In *Ring v. Wheeler*, 7 Cowen, 725, already referred to, the question arose on a motion in arrest of judgment, and the court held that they were bound to infer, after verdict, that the words were false, were uttered wilfully and maliciously, and were irrelevant, and therefore refused to arrest the judgment. In *Allen v. Crofoot*, 2 Wend. 515, a verdict was set aside which had been recovered for words spoken by the defendant before a magistrate, in answer to a question by the plaintiff, who had been arrested by a warrant upon a sworn complaint. The court held, Mr. Justice MARCY giving the opinion, that whether the words were or were not spoken in the course of the proceeding upon the defendant's complaint, or under circumstances to induce him to believe that it was necessary for him to repeat the charge contained in his complaint, should have been submitted to the jury. In *Garr v. Selden*, in the court of appeals, 4 Comst. 91, the alleged libel was an affidavit made by the defendant in resisting a motion to strike out a notice annexed to his plea, in an action brought against him by the plaintiff. The court held that if the affidavit were pertinent to the motion, the law did not permit a party to question its truth or innocency in an action for libel, or to allege in that form of action, that it was false or malicious.

These cases leave no room to doubt that in England and in the courts of this state, the rule has been very steadily adhered to which protects parties and witnesses for statements pertinently made by them in the assertion of their rights, or the discharge of their duties as such. I see no reason why this protection should be confined to the trial of issues in suits or indictments, or to oral examinations, so as to exclude affidavits even if voluntarily made, if otherwise regular and pertinent. The phrase employed by the judges and the text writers, in speaking of this sort of privileged communications, is "judicial proceedings." This is not confined to trials of civil actions or indictments but includes every proceeding before a competent court or magistrate in the due course of law or the administration of justice, which is to result in any determination or action of such court or officer. Thus in *Allen v. Crofoot*, *supra*, the proceeding was a preliminary examination before a justice of the peace on a complaint for larceny or burglary. In *Astley v. Young*, 2 Burr. 807, also cited above, the statement complained of was contained in an affidavit made to resist an application to the court of king's bench to compel the justices of Wiltshire to license an innkeeper. In *Captain Baillie's* case the libelous charges were in a memorial submitted to the governor of Greenwich hospital. It is very clear, I think, that the privilege or protection extended by the law to this class of cases must be commensurate with the liability of the party commencing or

instigating the proceeding to an action for a malicious prosecution, and that of the person testifying, to an indictment for perjury. Nor is the privilege to be confined to testimony obtained as it were upon compulsion, by legal process. We are in the daily habit of receiving and acting upon statements made in affidavits sworn to by parties who have not been compelled to testify. It is necessary, in many cases, to the due and efficient administration of justice, that such affidavits should be made and the persons making them should be protected; otherwise we should constantly be compelled to issue process and take examinations which we now receive more easily and speedily by the voluntary action of the parties. There might be cases where the necessity of resorting to proceedings apparently *in invitum* to obtain evidence of facts which courts and magistrates receive in affidavits, would seriously hinder if not entirely defeat the ends of justice. I am of opinion that whenever a person testifies, either voluntarily or under process of subpoena, to matters pertinent and material in a proceeding before a court or magistrate of competent authority, he is entitled to unqualified protection against any action for defamation by the words thus uttered.

Having thus determined the principles upon which the rights of these parties depend, we are prepared to consider whether the complaint contains enough to show that the certificate and affidavit for making which this action was brought were privileged and entitled to immunity. We are probably bound to take judicial notice of the character of the proceeding by which the plaintiff was confined. By title 3 of chapter 20, part 1st of the Revised Statutes, (1 R. S. 634), as amended by the acts of 1838, 1842 and 1844, it is made the duty of the committee of a lunatic who is possessed of property, or his relatives if he have no property, to provide for his confinement if he is disordered in his senses to such an extent as to endanger his own person or property or that of others. If the committee, or the relatives, of such a person neglect to confine him, it is made the duty of the overseers of the poor of the city or town where he belongs to apply to any two justices of the peace of such town, who may, if satisfied that such person ought not to go at large, commit him to some proper place of restraint. Section 8 of the statute authorizes two justices of the city or town to issue their warrant for the apprehension and confinement of a mad person, on their own view or upon the oath and information of others without the application of the overseers. Section 22 of chapter 135 of the laws of 1842 requires the evidence of two reputable physicians, under oath, to the fact of the insanity of any person, before any magistrate or officers shall order the confinement of such person. The argument for the defendant proceeds upon the theory, first that a statement made in the course of a proceeding taken under and according to this statute as evidence to the magistrates of the lunacy of the plaintiff, was a privileged communication,

and second that the alleged libels set out in the complaint sufficiently appear to have been uttered by the defendant while testifying or furnishing evidence in such a proceeding. The first proposition I am prepared to agree to. It is not, in my judgment, libelous or actionable as such, for a physician to furnish evidence, either voluntarily or under a subpoena, that another is insane, in a proceeding duly taken under any of the clauses of this statute. If the physicians in this case were parties to a conspiracy to deprive the plaintiff of his liberty, or to set on foot a malicious and groundless prosecution under the forms of law, they may be liable to an action for that. But no action of libel can be maintained for an assertion of the insanity of the plaintiff, contained in an affidavit made in a proceeding properly and legally instituted under this statute.

To sustain the present demurrer, however, it is necessary that it should appear distinctly by the complaint, that the occasion of uttering the alleged libel was such as I have just mentioned. The complaint must state all the facts which the defendant would be obliged to plead in setting up his privilege, in order to show that the plaintiff has no cause of action in the publication of a charge which in itself is clearly libelous. In this respect I think the defendant's counsel is mistaken in his view of the case. The complaint alleges, as has been already noticed, the publication of a paper consisting of a certificate purporting to be signed by the defendant and another person, and an affidavit signed by the defendant alone, and purporting to be sworn to before two persons who describe themselves as justices of the peace. It proceeds to state that the defendant "presented the said certificate and affidavit to the said justices of the peace," who thereupon issued a warrant, of which a copy is annexed. There is, however, no statement that these persons were justices of the peace, nor that they resided in the city or town with the plaintiff, which is necessary to give them jurisdiction to act. It does not appear how the proceeding was instituted; whether by the overseers of the poor or by two justices of the peace of their own motion. It is not stated whether the defendant voluntarily furnished the documents set out in the complaint, or whether they were made under the summons or at the request of the magistrates. One portion of the alleged libel is a certificate not under oath, and we have not been shown, nor have I been able to discover, any part of the statute requiring or authorizing such a paper. If the evidence given by the defendant was furnished voluntarily, I apprehend it was necessary for him to satisfy himself, and to show to the court, that the proceeding was regular and the magistrates had jurisdiction of the case. Where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent, general or ordinary jurisdiction and proceeding according to the course of the common law, he may not be required to know or to prove that all the facts existed, or all the steps had

been taken, which were necessary to confer jurisdiction in the particular case. But where a man intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libelous charges against another. I am of opinion that the complaint in this action does not contain enough to show that the libelous publication which it sets forth was uttered in the course of a judicial proceeding duly instituted before a magistrate who had jurisdiction, and that therefore the demurrer was properly overruled, and the order appealed from should be affirmed, with costs.

(b) *QUALIFIED*

WASON V. WALKER.

(L. R. 4 Queen's Bench, 73.—1868.)

COCKBURN, C. J. This case was argued a few days since before my Brothers LUSH, HANNEN, and HAYES, and myself, and we took time, not to consider what our judgment should be, for as to that our minds were made up at the close of the argument, but because, owing to the importance and novelty of the point involved, we thought it desirable that our judgment should be reduced to writing before it was delivered.

The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, *dicta* of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extra-judicial. In

the case of *Rex v. Wright*, 8 T. R. 293, LAWRENCE, J., placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate unauthorized by the House. Again in *Davison v. Duncan*, 7 E. & B. 229, WIGHTMAN, J., seems disposed to treat the reports of proceedings in parliament as entitled to the same privilege as reports of proceedings in courts of justice. But here again the question before the court had reference to a report, not of a proceeding in parliament, but of proceedings at a public meeting of improvement commissioners of a particular locality, in which the conduct of an individual had been assailed, and which report the court held not to be privileged, without being in any way called upon to determine how far the privilege would have extended to a report of proceedings in parliament. On the other hand, in *Stockdale v. Hansard*, 9 Ad. & E. 181-186, 212-214, LITTLEDALE, J., and PATTESON, J., use language from which it may be safely inferred that they would have deemed the report of a parliamentary debate if containing an attack on character, as not entitled to be held privileged in an action for libel. But here again the question was not how far the publication of parliamentary debates was privileged, but solely whether an order of the House of Commons directing a paper, forming no part of the proceedings of the House, and containing libellous matter, to be printed and sold to the public, and a resolution of the House that such an order was within its privileges, protected the publisher of the paper from an action of libel. Any opinion expressed on the subject of the report of parliamentary debates was therefore beyond the scope of the inquiry, and must be considered as more or less extra-judicial.

Several cases were cited in the course of the argument before us, but they turned for the most part on the question of parliamentary privilege, and therefore appear to us very wide of the present question. The case of *Rex v. Wright*, 8 T. R. 293, approaches nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information the court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of parliament, could not possibly be libellous. LORD

KENYON, C. J., says, "This report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now *sub judice*; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the houses of parliament is a libel; and yet that is to be taken as the foundation of this application." (8 T. R. at p. 296.) Lord KENYON and his colleagues appear to have thought that a paper, though containing matter reflecting on the character of an individual, if it formed part of the proceedings of the House of Commons, would be so divested of all libellous character as that a party publishing it, even without the authority of the House, would not be responsible at law for the defamatory matter it contained. If this doctrine could be upheld, it would have a manifest bearing on the present question, for as no speech made by a member of either House, however strongly it may assail the conduct or character of others, can be held to be libellous, it would follow, such a speech being a parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *Rex v. Lord Abingdon*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273, in which the publication of speeches made in parliament reflecting on the character of individuals was held to be actionable. And it must be admitted that the authority of the case of *Rex v. Wright*, 8 T. R. 293, is much shaken, not only by the decision in *Rex v. Creevey*, 1 M. & S. 273, but also by the observations made by Lord Ellenborough in his judgment in the latter case.

Beyond, however, impugning the authority of *Rex v. Wright*, 8 T. R. 293, the two last-mentioned cases afford little assistance towards the solution of the present question. There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect, and the faithful publication of parliamentary debates in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one.

The case of *Lake v. King*, 1 Saund., which was cited in the argument before us, has no application to the present case. There, a petition having been presented to the House of Commons by the defendant, impugning the conduct of the plaintiff, copies of the petition had been printed and circulated among the members of the House, and it was held that, the printing and circulating petitions being according to the course and usage of parliament, no action would lie.

The case of *Stockdale v. Hansard*, 9 Ad. & E. 1, which was much pressed upon us by the counsel for the defendant, is in like manner beside the question. In that case a report from the inspectors of prisons relative to the jail of Newgate, in which a work published by the plaintiff, a book-

seller, and which had been permitted to be introduced into the prison, had been described as "of a most disgusting nature," and as containing "plates obscene and indecent in the extreme," had been presented to the House in conformity with the Act of 5 & 6 Wm. 4, c. 38. In another report, being a reply to a report of the court of aldermen on the same subject, the inspectors had reiterated their charges as to the character of the book, adding that it had been described by medical booksellers, to whom they (the inspectors) had applied for information as to its character, as "one of Stockdale's obscene books." These papers the House had ordered to be printed, not only for the use of members, but also, in conformity with a modern practice, for public sale, the proceeds to be applied to the general expenses of printing by the House. An action of libel having been brought by Stockdale against the defendants, the printers of the House of Commons, for publishing these papers, the defence as raised by the plea which this court had to consider was, first, that the papers in question had been published by order of the House of Commons; secondly, that the House having resolved (as it had done with a view to such an action) that the power of publishing such of its reports, votes, and proceedings, as it should deem necessary, was an essential incident to the functions of parliament, the question became one of privilege, as to which the decision of the House was conclusive, and could not be questioned in a court of law.

From the doctrines involved in this defence, namely, that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a court of law from inquiring into the existence of the privilege,—doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the Legislature,—Lord DENMAN and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold.

To the decision of this court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position, that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, as explained by BAYLEY, J., in *Bromage v. Prosser*, is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. "The rule," says Lord CAMPBELL, C. J., in the case of *Taylor v. Hawkins*, 1 Q. B., at p. 321, "is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice."

It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true

ground is that given by LAWRENCE, J., in *Rex v. Wright*, 8 T. R. at p. 298, namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In *Davison v. Duncan*, 7 E. & B. at p. 231, Lord Campbell says: "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And WIGHTMAN, J., says: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great."

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with LAWRENCE, J., in *Rex v. Wright*, 8 T. R. at p. 298, that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the

undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the Legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state,—no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honor is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question?

The learned counsel for the plaintiff scarcely ventured as of his own assertion to deny that the benefit to the public from having the debates in parliament published was as great as that which arose from

the publishing of the proceedings of courts of justice, but he relied on the *dicta* of LITTLEDALE, J., and PATTESON, J., in *Stockdale v. Hansard*, 9 Ad. & E. 1, and on the opinions of certain noble and learned lords in the course of debates in the House of Lords on bills introduced by LORD CAMPBELL for the purpose of amending the law of libel. (In 1843: see Hansard's Parliamentary Debates, 3d series, vol. 70, pp. 1254-8; and in 1858: see vol. 149, pp. 947-82.) There is no doubt that in delivering their opinions in *Stockdale v. Hansard*, 9 Ad. & E. 1, the two learned judges referred to denied the necessity and in effect the public advantage of the proceedings in parliament being made public. The counsel for the defendant in that case having insisted, as a reason why the power to order papers to be printed and published should be considered within the privileges of the House of Commons, on the advantage which resulted from the proceedings of parliament being made known, the two learned judges, not satisfied with demonstrating, as they did, by conclusive arguments, that the House had not the power to order papers of a libellous character and forming no part of the proceedings of the House to be published, still less to conclude the legality of such a proceeding by the assertion of privilege, thought it necessary to follow the counsel into the question of policy and convenience, and in so doing took what we cannot but think a very short-sighted view of the subject. This is the more to be regretted, as their observations apply not only to the printing of papers by order of the House, the only question before them, but also to the publication of parliamentary proceedings in general, the consideration of which was not before them, and therefore was unnecessary. LORD DENMAN, in his admirable judgment, than which a finer never was delivered within these walls, and in which the spirit of Holt is combined with the luminous reasoning of a Mansfield, while overthrowing by irresistible arguments the positions of the Attorney-General, was content to answer the argument as to the policy of allowing papers to be published by order of either of the houses of parliament, not by denying the policy of giving power to the House to order the printing and publishing of papers, but by saying that such power must be provided for by legislation. On the subject of the publication of parliamentary debates he said nothing, nor was he called upon to say anything. That the Legislature did not concur with the two judges in their view of the policy is manifest from the Act of 3 Vict. c. 9, passed in consequence of the decision in *Stockdale v. Hansard*, 9 Ad. & E. 1, the preamble of which statute recites that "it is essential to the due and effectual exercise and discharge of the functions and duties of parliament and to the promotion of wise legislation that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either house of parliament as such house of parliament may deem fit or necessary to be published." After which

the Act proceeds to provide for the prevention of actions being brought in respect of papers published by order of either house of parliament.

As regards the attempt of LORD CAMPBELL to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment, (See Hansard's Parliamentary Debates, 3d series, vol. 70, p. 1254, and vol. 149, p. 947), we think it may be as well accounted for by the apprehension, as to the result of any proceeding at law in which the legality of such publication should come in question, produced in his mind by the language of the judges in *Stockdale v. Hansard*, 9 Ad. & E. 1, as by any conviction of the defectiveness of the law. And as regards the opinions of the noble and learned persons in the debates in the House of Lords, we must observe that the discussion proceeded on the assumption that the publishing of parliamentary debates, if involving defamatory matter, was contrary to law, and actionable, although no decision to that effect had ever been pronounced, and no argument or discussion on the point had ever taken place. We, before whom this question is now presented for judicial decision for the first time, and who have had the advantage of able and learned arguments at the bar to assist us, must endeavor to ascertain the law as applicable to the case, and, if our minds are satisfied as to what the law is, must decide according to our convictions, undeterred by the authority of great names or the opinions of those who, although our superiors in all other respects, had not the advantage of forensic discussion, or the opportunity of a judicial consideration of the subject. And this is the more necessary, as we observe that one of the main grounds insisted on for resisting LORD CAMPBELL's bill was, that there was no necessity for legislation, inasmuch as no action had ever been brought in respect of the publication of a parliamentary debate. We cannot but think that,—had the noble and learned persons referred to foreseen that such an action as the present would be brought, in which a party, having by his own attack upon a public man given rise to a debate in one of the houses of parliament which he knew would, in the ordinary course of things, be reported, charges as a libel the publication of the discussion which he himself has provoked, and which publication he would have hailed with satisfaction if the result of it had been favorable to himself and damaging to the object of his attack,—they would have paused before they assumed that by law such an action could be maintained, or at all events would have seen the necessity for an immediate amendment of a law so defective.

We, however, are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy be-

tween the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other; a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273. At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison v. Duncan*, 7 E. & B. at p. 233, as to such a speech being privileged if *bona fide* published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament.

It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament. The fact, no doubt is, that each house of parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either house of parliament ever be so ill-advised as to prevent its proceedings from being made known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the house and the publisher. For the present purpose, we must treat such publication as in every respect

lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.

So much for the great question involved in this case. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the "Times" commenting on the debate in the House of Lords, and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made, and that consequently the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts,—in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticise and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.

Considering the direction thus given to have been perfectly correct, we are of opinion that in respect of the alleged misdirection as also on the former point, the ruling at *nisi prius* was right, and that consequently this rule must be discharged.

Rule discharged.

CHILD V. AFFLECK.

(9 Barnewall & Cresswell, 403.—1829.)

CASE for a libel. Plea, the general issue. At the trial before LORD TENTERDEN, C. J., at the Westminster sittings after Hilary term, it appeared in evidence that the plaintiff had been in the service of the defendants, Mrs. Affleck having before she hired her made inquiries of two persons, who gave her a good character. The plaintiff remained in that service a few months, and was afterwards hired by another person, who wrote to Mrs. Affleck for her character, and received the

following answer, which was the alleged libel: "Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favor. She lived with Mrs. A. but for a few weeks in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury." In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written, Mrs. Affleck went to the persons who had recommended the plaintiff to her, and made a similar statement to them. Upon this evidence it was contended, for the defendants, that there was no proof of malice, and that consequently the plaintiff must be nonsuited. On the other hand, it was urged that Mrs. Affleck's statement of what the plaintiff's conduct had been after she left her service was not privileged, and that, at all events, that part of the letter and the statement that she voluntarily made to other persons, and not in answer to any inquiries, were evidence of malice. LORD TENTERDEN, C. J., was of opinion that the latter part of the letter was privileged, and that the other communications being made to persons who had recommended the plaintiff, were not evidence of malice, and he directed a nonsuit. A rule *nisi* for a new trial was obtained.

PARKE, J. The rule laid down by LORD MANSFIELD, in *Edmonson v. Stevenson*, [Bull. N. P. 8], has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." The question then is, whether the plaintiff in this case adduced evidence, which, if laid before a jury, could properly lead them to find express malice. That does not appear upon the face of the letter. *Prima facie* it is fair, and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. Affleck was justified in making it. In *Rogers v. Clifton*, [3 B. & P. 587], evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In *Blackburn v. Blackburn*, [4 Bing. 395], the occasion of writing the alleged libel did not distinctly appear, it was therefore properly left to the jury to say, whether it was confidential and privileged or not, and they found that it was not. Here the letter was undoubtedly *prima facie* privileged, the plaintiff, therefore, was bound to prove express malice in order to take away the privilege.

*Rule refused.*¹

¹ Opinions by Bayley and Littledale, JJ., and by Lord Tenterden, C. J., omitted.

FRESH v. CUTTER.

(73 Maryland 87.—1890.)

APPEAL from Circuit Court, Washington County.

"And the defendant, for a second plea, says: that he honestly and *bona fide* believed the words spoken by him were true, and that he spoke them to a neighbor who had employed the plaintiff, or was about to employ him, and that he spoke the words to said neighbor in the *bona fide* performance of a duty, and without malice; and for a third plea the defendant says: that, when he spoke the alleged slanderous words set forth in the declaration, he honestly and *bona fide* believed them to be true, and that he spoke them only to a neighbor, Mr. C. Allen, who had employed, or was about to employ, the plaintiff, and that he spoke the said words to said neighbor in the *bona fide* performance of a duty and without malice." Demurrers were sustained to these pleas.

McSHERRY, J. Jacob Cutter sued George H. Fresh for defamatory words alleged to have been spoken by the latter of and concerning the former. Cutter had at one time been an employee of Fresh, but after he ceased to occupy that relation, and had entered, or was about to enter, the service of one Allen, Fresh, of his own accord, and without solicitation or inquiry on the part of Allen, said to Allen, "He [meaning the plaintiff] stole as good as two hundred dollars from me, and I want the money." These are the alleged defamatory words. It was shown by the evidence that several persons had communicated information to Fresh which induced him to believe that Cutter had while in his employment stolen from him. It was also shown that when he learned that his neighbor Allen had employed Cutter, he, Fresh, honestly believed that it was his duty to inform Allen of what he knew concerning Cutter; and that he told Allen these things voluntarily, and without being requested, honestly believing it was a duty he owed to his neighbor, and for the sole purpose of putting Allen upon his guard. He testified that he had not been actuated by malice or ill will, and that he had never had any bad feeling against Cutter. There was some evidence that the words complained of had been spoken by Fresh to a person named Click, though the latter was unable to state whether the language used by the defendant was "took" or "stole."

This brief outline of the facts is sufficient to indicate that the principal question which we are called upon to decide on this appeal is whether the statement made by Fresh to Allen, under the circumstances named, was a privileged communication or not. If privileged, all the authorities agree in holding that it is not absolutely or unqualifiedly,

but only conditionally, so. If falsely and maliciously made, it would be actionable. Malice is the foundation of the action, and in ordinary cases is implied from the slander; but there may be justification from the occasion, and when this appears, an exception to the general rule arises, and the words must be proved to be malicious as well as false. *Beeler v. Jackson*, 64 Md. 593. This justification from the occasion arises, in the class of cases now being considered, when a communication is "made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding interest or duty," although the communication "contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty, be not a legal one, but only a moral or social duty of imperfect obligation." *Harrison v. Bush*, 5 El. & Bl. 344. It seems to be generally conceded, as falling within this principle, that where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed, that the character was given without malice, and the plaintiff, to support the action, must prove that the character was both falsely and maliciously given; and, although the statement as to the character should be untrue in fact, the master will be held justified by the occasion, unless it can be shown that in making the statement he was actuated by a malicious feeling, and knowingly stated what was untrue and injurious. Starkie, Sland. & L. 253. If, under the conditions just named, the statement be made in response to an inquiry, it would undoubtedly be privileged. *Weatherston v. Hawkins*, 1 Term R. 110; *Child v. Affleck*, 9 Barn. & C. 403.

But in the case at bar it is conceded that the information was given by the appellant to Allen voluntarily, and not in response to any inquiry whatever, and this is supposed to take the case out of the privilege. It is not perceived why this circumstance should make any difference if the party has acted honestly, fairly, and without malice, though, when the information has been voluntarily given, this fact, it has been said, may in some cases have a tendency to disclose the motive of the publisher in making the publication. Townsh. Sland. & L., § 241. Without reviewing the decided cases, it may be said that the weight of authority is to the effect that the mere fact of the communication being voluntarily made does not necessarily exclude it as a non-privileged communication, for a publication warranted by an occasion apparently beneficial and honest is not actionable, in the absence of express malice. Starkie, Sland. & L. 253. Or, as stated in *Odgers*, Sland. & L. 202: "If it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B. was an intimate friend or a relation of mine, and there was no other evidence of malice except that I volun-

teered the information, the occasion would still be privileged." *Rogers v. Clifton*, 3 Bos. & P. 587; *Pattison v. Jones*, 8 Barn. & C. 585. It is a question for the court whether the statement, if made in good faith, and without malice, is thus privileged. But the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury if there be evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its necessary publicity, or otherwise, a purpose wrongfully to defame the plaintiff. *Dale v. Harris*, 109 Mass. 196; *Brow v. Hathaway*, 13 Allen, 239; *Somerville v. Hawkins*, 10 C. B. 583; *Gassett v. Gilbert*, 6 Gray, 94. Or malice may be established by showing that the publication contained matter not relevant to the occasion. Townsh. Sland. & L., § 245. Expressions in excess of what the occasion warrants do not *per se* take away the privilege, but such excess may be evidence of malice. *Ruckley v. Kiernan*, 7 Ir. C. L. 75; *Hotchkiss v. Porter*, 30 Conn. 414.

It follows from these principles that if the communication made to Allen was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty which Fresh owed to Allen to make it, the words complained of would not be actionable because privileged, though spoken voluntarily. It is equally clear that if the words spoken were known to be false and were maliciously spoken, or were voluntarily spoken to one to whom Fresh owed no duty, in the sense heretofore mentioned, the words would be actionable, because not within the privilege.

In view of these conclusions, there was error in granting the appellee's first and second instructions. Those instructions are as follows, viz.: "The plaintiff prays the court to instruct the jury that if they shall believe from the evidence that the words charged in the declaration were spoken of and concerning the plaintiff by the defendant, in the presence and hearing of other persons than the plaintiff, then the plaintiff is entitled to recover in this action." "That if the jury shall find for the plaintiff, they may award such damages as they in their judgment shall think justified by all the circumstances of the case, not only for the purpose of giving compensation for the injury done to the plaintiff, but also for the purpose of punishing the conduct of the defendant."

The first instruction was wrong in omitting all reference to the defense of privilege. It directed the jury to find for the plaintiff if they believed the defendant spoke the words in the presence and hearing of other persons than the plaintiff. Under this instruction, the jury were required to return a verdict against the defendant, even though they were satisfied that the words were spoken to Allen alone, in good faith, without malice, in the full belief of their truth, and under the honest conviction that Fresh was only discharging a social duty to his

neighbor in making the communication. This entirely ignored the question of privilege, which was the only defense relied on by the appellant. The second instruction was also erroneous. It allowed punitive damages to be recovered even though the jury were not required to find the existence of actual malice on the part of the appellant. In cases of this character, such is not the law. If the occasion brings the words within a qualified privilege, no damages can be recovered at all, unless the plaintiff shows that actual malice prompted the publication or utterance. The jury should have been so instructed; but they were permitted, not merely to assess damages, but punitive damages, without any regard whatever to the question of malice. It is true these instructions were taken literally from the case of *Padgett v. Sweeting*, 65 Md. 404, where they were held by this court to be correct. But that case was widely different from the one at bar. In the former there was no question of privilege. The words, as here, were actionable *per se*, but were not, as in this case it is alleged, spoken on any occasion which justified their utterance. Under the conditions in *Padgett's Case*, the instructions were proper. But the same instructions could not be given in a case like the one before us now, without ignoring all the circumstances admitted in evidence respecting the occasion of the publication, the motive which inspired it, the belief of the defendant in its truth, and the honesty and good faith of its utterance.

* * * * *

For the error indicated in granting the appellee's first and second prayers, the judgment must be reversed, and a new trial must be awarded.

Judgment reversed, and new trial awarded.

BYAM V. COLLINS.

(111 New York, 143.—1888.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the defendants, who were husband and wife, entered upon the verdict of a jury. (See 39 Hun, 204.)

EARL, J. The general rule is that in the case of a libellous publication the law implies malice and infers some damage. What are called privileged communications are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made *bona fide* upon any subject matter in which the party

communicating has an *interest* or in reference to which he has a duty, is privileged if made to a person having a corresponding *interest* or *duty*, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 Ellis & Black (Q. B.) 344, and has been generally approved by judges and text-writers since. In *Toogood v. Spyring*, 1 Cr. M. & R. (Ex.) 181, an earlier case, it was said that the law considered a libellous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned;" and that statement of the rule was approved by FOLGER, J., in *Klench v. Colby*, 46 N. Y. 427, and in *Hamilton v. Eno*, 81 N. Y. 116. In *White v. Nicholls*, 3 How. (U. S.) 266, 291, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it from that just implication from which the general law is deduced."

Whether within the rule as defined in these cases a libellous communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury.

It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties, the one making and the one receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In *Whiteley v. Adams*, 15 C. B. (N. S.) 392, ERLE, Ch. J., said: "Judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification;" and in the same case, BYLES, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty; the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation by which private character may be overwhelmed and irreparable mischief done, and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty, not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. In *Coxhead v. Richards*, 2 Mann., G. & S. 569, 602, COLTMAN, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is very hard on the other hand to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others; the propensity to tale-bearing and slander is so strong amongst mankind, and when suspicions are aroused, men are so apt to entertain them without due examination in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected;" and in the same case CRESSWELL, J., said: "If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the shipowner that which he *believed* to be true."

One may not go about in the community and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In *Godson v. Home*, 1 B. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah to deprecate his so employing the plaintiff, and it was held to be clearly not a confidential or privileged communication. In *Storey v. Challands*, 8 C. & P. 234, one Hersford was about to deal with the plaintiff when he met the defendant who said at once, without his opinion being asked at all, "if you have anything to do with Story you will live

to repent it, he is a most unprincipled man," etc., and Lord DENMAN directed a verdict for the plaintiff because the defendant began by making the statement without waiting to be asked. In *York v. Johnson*, 116 Mass. 482, the defendant, a member of a church, was appointed with the plaintiff and other members of the church on a committee to prepare a Christmas festival for the Sunday school. He declined to serve, and being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman, and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet DEVENS, J., in the opinion said: "The ruling requested by the defendant that the communication made by him to Mrs. Newton was a privileged one and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York; but he was under no obligation to give any reason therefor, however persistently called upon to do so; and even if Mrs. Newton had an interest in knowing the character of Mrs. York, as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer and had been engaged in the practice of his profession at Caledonia for several months and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora and they had been very intimate friends. Dora had a father and no brother, and Mrs. Collins had a brother. During the time of this intimacy and at some time, before the marriage of Mrs. Collins Dora repeatedly requested of her that if she "knew anything about any young man she went with, or in fact any young man in the place, to tell her because her father did not go out a great deal and had no means of knowing, and people would not be apt

to tell him," that she, Mrs. Collins, had a brother and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors and believed them, and therefore, did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man or about any young man in whom she had any interest; but it was for information about the young men generally with whom she associated. Nor literally construing the language, did Dora wish for information as to the gossip and rumors afloat about young men. What she asked for was such facts as Mrs. Collins, *knew* and not for her opinion about young men or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony; it was for information about all the young men in her circle. Mrs. Collins was not related to her and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information, did not make the defamatory communication privileged. *York v. Johnson, supra.*

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so if they did so find. On the contrary, it is clear that Dora would not, at the time, have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins' letter was prompted by her friendship for Dora and by the solicitation of "mutual friends to interfere in the matter and break off the relations which

seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in warning the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her," upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins in writing that letter act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did, if she acted, as an ordinarily prudent person would act under the same circumstances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith and without malice. But a mere volunteer having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text books and judicial opinions supporting the contention of the defendant that this letter was, in some sense, a privileged communication. But, after a very careful research, I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than that of any other, is that of *Todd v. Hawkins*, 8 Car. & P. 88. In that case, a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character, and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury was satisfied that, in writing it, he acted *bona fide*, although the imputations contained in the letter

were false or based upon the most erroneous information; and if he used expressions, however harsh, hasty or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other, there would have been a mere question of damage. A case nearer in point is that of "*The Count Joannes v. Bennett*, 5 Allen, 169. There it was held that a letter to a woman containing libellous matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that, in writing the letter, the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not, in any way, interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before the same learned court decided the case of *Krebs v. Oliver*, 12 Gray, 239, wherein it was held that statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion, it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship."

I am, therefore, of opinion that the letter was in no sense, upon the facts as they appear in the record, a privileged communication.

There was, also, error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies, in part, to these slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "there is not that presumption of malice in the case of oral slanders that there is in the case of a deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged, the law implies malice.

The judge further charged the jury, in substance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence, after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications.

There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins as an emissary from or an agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her, and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her either to gratify his curiosity, or to prevent the impending litigation between the parties. But even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged.

The trial judge, therefore, erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out, the judgment should be reversed and a new trial granted.

* * * * *

All concur with EARL, J., for reversal, except DANFORTH, J., dissenting.
*Judgment reversed.*¹

JOANNES v. BENNETT.

(5 Allen, 169.—1862.)

TORT brought on the 12th of June, 1860, in the name of "The Count Joannes (born 'George Jones,')" for two libels upon him contained in letters to a woman to whom he was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage.

¹ Dissenting opinion by Danforth, J., omitted.

At the trial in this court, before MERRICK, J., it appeared that the defendant had for several years held the relation of pastor to the parents of the woman, as members of his church, and to the daughter, as a member of his choir; and there was evidence tending to show that he was on the most intimate terms of friendship with the parents, and that, on the 18th of May, 1860, being on a visit from his present residence in Lockport, New York, he called upon the father at his place of business in Boston, and was urged by him to accompany him to his residence in South Boston, the father stating that both he and his wife were in great distress of mind and anxiety about their daughter, and that they feared she would engage herself in marriage to the plaintiff. On their way to South Boston, the father stated to the defendant what he and his wife had heard and apprehended about the plaintiff, and their views with regard to his being an unsuitable match for their daughter, who, with a young child by a former husband, was living with them. On reaching the house, it was found that the daughter had gone out; and it was then arranged that the defendant should write a letter, and materials for that purpose were furnished, and the letter set forth in the first count was written, addressed to the daughter, and left open and unsealed with the mother, after the principal portion of it had been read aloud at the tea-table in the presence of the parents and a confidential friend of the family. On leaving, the defendant was further requested to do what he thought best to induce the daughter to break up the match.

The judge ruled that the letter was not a privileged communication; and a verdict was returned for the plaintiff. The defendant alleged exceptions.

BIGELOW, C. J. The doctrine, that the cause or occasion of a publication of defamatory matter may afford a sufficient justification in an action for damages, has been stated in the form of a legal rule or canon, which has been sanctioned by high judicial authority. The statement is this: A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libellous and actionable. It would be difficult to state the result of judicial decisions on this subject, and of the principles on which they rest, in a more concise, accurate and intelligible form. *Harrison v. Bush*, *Gassett v. Gilbert*, 6 Gray, 94, and cases cited. It seems to us very clear that the defendant in the present case fails to show any facts or circumstances in his own relation to the parties, or in the motives or inducements by which he was led to write the letter set out in the first count of the declaration, which

bring the publication within the first branch of this rule. He certainly had no interest of his own to serve or protect in making a communication concerning the character, occupation and conduct of the plaintiff, containing defamatory or libellous matter. It does not appear that the proposed marriage which the letter written by the defendant was intended to discountenance and prevent, could in any way interfere with or disturb his personal or social relations. It did not even involve any sacrifice of his feelings or injury to his affections. The person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred. It is not shown that he had any peculiar interest in her welfare. Under such circumstances, without indicating the state of facts which might afford a justification for the use of defamatory words, it is plain that the defendant held no such relation towards the parties as to give him any interest in the subject-matter to which his communication concerning the plaintiff related. *Todd v. Hawkins*, 2 M. & Rob. 20; S. C., 8 C. & P. 88. No doubt, he acted from laudable motives in writing it. But these do not of themselves afford a legal justification for holding up the character of a person to contempt and ridicule. Good intentions do not furnish a valid excuse for violating another's rights, or give impunity to those who cast unjust imputations on private character.

It is equally clear that the defendant did not write and publish the alleged libellous communications in the exercise of any legal or moral duty. He stood in no such relation towards the parties as to confer on him a right or impose on him an obligation to write a letter containing calumnious statements concerning the plaintiff's character. Whatever may be the rule which would have been applicable under similar circumstances while he retained his relation of religious teacher and pastor towards the person to whom this letter in question was addressed, and towards her parents, he certainly had no duty resting upon him after that relation had terminated. He then stood in no other attitude towards the parties than as a friend. His duty to render them a service was no greater or more obligatory than was his duty to refrain from uttering and publishing slanderous or libellous statements concerning another. It is obvious that if such communications could be protected merely on the ground that the party making them held friendly relations with those to whom they were written or spoken, a wide door would be left open by which indiscriminate aspersion of private character could escape with impunity. Indeed, it would rarely be difficult for a party to shelter himself from the consequences of uttering or publishing a slander or libel under a privilege which could be readily made to embrace almost every species of communication. The law does not tolerate any such license of speech or pen. The duty of avoiding the use of defamatory words cannot be set aside except when it is essential to the

protection of some substantial private interest, or to the discharge of some other paramount and urgent duty. It seems to us, therefore, that on the question of justification set up by the defendant under a supposed privilege which authorized him to write the letter set out in the first count, the instructions of the court were correct.

* * * * *

KING v. PATTERSON.

(49 New Jersey Law, 417.—1887.)

ERROR to the Supreme Court upon the rulings and charge of the trial judge in an action to recover for defamatory matter, affecting the financial condition of the plaintiff below, Emma Patterson, published by King and others, the defendants below, who conducted a mercantile agency in the city of New York. The defense was that the publication was a privileged communication.

DARUN, J. Defamatory words uttered in a privileged communication are not actionable unless there be proof of actual malice. If such words are uttered *bona fide* on a privileged occasion, in an honest belief that they are true, the party injured is remediless. *Spill v. Maule*, L. R. 4 Exch. 232; *Clark v. Molynaux*, 3 Q. B. Div. 237. A wrong or malicious motive is essential to the action where the communication is privileged.

On the other hand, where the publication imputes a crime, so as to be actionable *per se*, or is actionable only on averment and proof of special damages, if the publication is not justified by proof of its truth or by the privileged occasion of publication, the law conclusively presumes malice such as is essential to the action. In such cases good faith and an honest belief in the truth of the publication will be no defense. The absence of a malicious motive may protect against exemplary damages, but will not bar the action. In a legal sense, malice, as an ingredient of actions for slander or libel, signifies nothing more than a wrongful act done intentionally, without just cause or excuse. Cooley on Torts, 209, and note. A defamatory publication, under the pretext of a privileged communication, where the privilege does not exist, is a publication without just cause or excuse, and in a legal sense malicious and therefore actionable, though it be made without a malicious motive.

The burden of proving that the occasion of publication was privileged is on the defendant. The issue whether the words were published from a malicious motive, so as to take from them the protection of the occasion

arises only when it has been shown that the occasion of speaking or publishing is one that is privileged. Where the occasion is privileged it is for the plaintiff to establish that the statements complained of were made from an indirect or improper motive, and not for a reason which would otherwise render them privileged. *Clark v. Molyneux, supra*; Pollock on Torts, 227, 234.

The fundamental question in this case, upon which the issue hinges, is whether the notification sheet of November 5th, 1884, containing the false statement on which the action is founded, was published and issued under such circumstances and in such a manner as to bring it within the class of communications which the law denominates privileged communications.

The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and actionable are various. Thus, memorials to officers of state respecting the conduct of magistrates and officers, comments by electors upon the character of candidates for office, communications in matters of public interest in which the public generally is concerned, communications in the interest of third persons or for the protection of the party's own interest, communications respecting the character of servants or the credit and responsibility of tradesmen, or made in the performance of social, moral, or legal duties, come within the class of privileged communications. Whether the privilege is available as a defense depends upon the circumstances of the particular case, the situation of the parties, the persons to whom, the circumstances under which, and the manner in which the communication was made. A publication which in one case would be justifiable, in another case would be without justification. A criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular, but such publicity given to comments derogatory to the character of a servant or to the financial standing of a trader would be illegal. A person, with a view of obtaining information on a subject in which he has a personal interest, or in offering a reward for bills of exchange lost out of his possession, may in some cases justifiably insert in a newspaper an advertisement containing imputations upon the character of others, as in *Delany v. Jones*, 4 Esp. 191, and *Finden v. Westlake*, 1 Moody & M. 461. He may justifiably advertise in that public manner the discharge of an agent whose employment had been that of a general collection agent, as in *Hatch v. Lane*, 105 Mass. 394, but such publicity to the discharge of his cook or his butler would be without justification. In some instances a voluntary imparting of information will be justified; in other cases the privilege applies only to information in response to inquiries. The subject may be one that is privileged, and a communication on that subject be unprivileged if the restraints and qualifications imposed by law upon the publicity

to be given the communication be not observed. If such restraints and qualifications are disregarded, the communication is unprivileged and actionable, though made from the best of motives. In such cases good faith and honest belief will be no defense. The act of communicating defamatory matter to persons with respect to whom there is no privilege is an act without legal justification or excuse, and therefore actionable.

When the restraints and qualifications imposed by law upon the publicity to be given to the publication are shown to have been observed, it is then, as was said by the court in *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 509, "all we have to examine is whether the defendant stated no more than he believed or might reasonably believe; if he stated no more than this he is not liable." Expressions of similar import are frequent in judicial opinions, but they have uniformly been preceded or accompanied by a judicial determination that the manner of publication was such as to make the communication privileged. No judicial precedent has ever treated good faith and honest belief, standing alone, as a justification of defamatory words.

The plaintiff was engaged in the retail clothing business, at Red Bank, in the county of Monmouth. The defendants conduct a mercantile agency in the city of New York. Their business consists in collecting information as to the credit and financial standing of dealers throughout the country. Four times a year they publish a book of ratings called the "reference book," and twice in each week a notification sheet called the "mercantile agency notification sheet." In the notification sheet of November 5th, 1884, there was published this information: "New Jersey. Red Bank. Patterson, Emma. Chattel mortgage, Samuel Ludlow, \$1385. Clothing." The publication was false, and for the injury to the plaintiff's business occasioned by it this suit was brought.

The suit is an action by a trader for false statement concerning her credit, and the defense that the publication was privileged must be decided upon those legal rules that give a privilege to communications of that character.

The trial judge charged that a communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it may contain criminal matter, which, without this privilege, would be slanderous or libelous and actionable.

This instruction was taken from the opinion of the Queen's Bench in *Harrison v. Bush*, 5 El. & B. 344. It conforms to the rule adopted in *Whiteley v. Adams*, 15 C. B. (N. S.) 392, and in *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495, in every respect material to this suit, and accords with the decision of the Court of Exchequer in *Toogood v. Spyring*, 1 C. M. & R. 181. In the latter case the defendant, a tenant

of the earl of Devon, required some work to be done on the premises occupied by him, and the plaintiff, who was generally employed by Brinsdon, the Earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner, and during the progress of the work became intoxicated, and some circumstances occurred which induced the plaintiff to believe that he had broken open the cellar door, and so obtained access to his cider. The court held that the communication of these facts to Brinsdon, the agent of the Earl, who, in virtue of his employment, had a duty to perform in the premises, was privileged, but that a communication at another time to one Taylor, a third person, who had no interest in the subject-matter, and no duty to perform in reference to it, was not privileged. The judgment of the court in *Toogood v. Spyring*, sanctions the rule adopted by the trial judge in this case.

The defendants were engaged of their own volition and for their own profit in the business of collecting and disseminating information as to the character, credit and pecuniary responsibility of traders throughout the United States. Their course of business was to transmit a copy of the record book and the semi-weekly notification sheet, containing the information they collected, to each of their subscribers, who paid the required annual subscription and signed a contract to hold such communications as confidential, without regard to the existence or nonexistence of an interest by the subscribers in the information communicated. The number of subscribers to whom the record book and notification sheets were sent does not appear in the case. Mr. Dun, the principal proprietor, testified that it was impossible for him to say how many copies were issued, as there were a number of branch offices, and of the number of their subscribers he had no knowledge. Enough appeared to show that the defendants' business of collecting and disseminating information is extensive, and that the number of subscribers to whom such information is communicated is very large. It appeared that one Myers, a creditor of the plaintiff, saw the notification sheet of November 5th, 1884, in the hands of Lisberger & Weiss, merchants doing business in Philadelphia, and that Lyons, another creditor, saw another copy of it on the desk of Simons & Co., in New York city. In consequence of the information contained in this sheet, Myers and Lyons went to Red Bank and demanded payment or security for their debts. The plaintiff's credit was thereby destroyed, and her business was broken up. Myers and Lyons were not subscribers of the defendants. Lisberger & Weiss had, some two years before, sold goods to the plaintiff, but the account was closed at that time. It did not appear that Simons & Co. ever had dealings with the plaintiff. Neither of these persons had, at the time the sheet was published, any business interest in the credit or financial standing of the plaintiff.

The trial judge applied the rule of law he adopted by an instruction in these words: "Had, then, Lisberger & Weiss an interest in knowing the financial condition and solvency of the plaintiff? Or had Simon & Co., in New York, such interest? Or had either party, the defendants, or Lisberger & Weiss, or Simon & Co., a duty with reference to the condition of the business affairs as between themselves? If they had, then such communication, made *bona fide*, with the guard by contract and other stipulation between the parties appearing in evidence, would be privileged. If there was no such interest or duty between the defendants and these subscribers, then they may be liable, as the publication was not privileged as to them, or to others who obtained it through them. If a request was made, either express or implied, by Lisberger & Weiss, or by Simon & Co., for such communication as to the plaintiff, then, if they had no interest in the matter, the book or sheet sent to them, or either of them, affecting her credit, would not be privileged. If made without such request, then the communication voluntarily sent by them must be at their risk as to the harm that may be done thereby. I think it is enough to hold, in this case, that the agency has the protection of the privilege in every case where the subscriber has a direct and personal interest in the person who is the subject-matter of inquiry, and that in all other cases they must stand as others, on the truthfulness of their report, and their protection under the contracts with subscribers not to divulge the secrets of their business."

In this discussion my citations will be limited to such cases as are regarded as leading cases, or are germane to the case before the court, with a view to distinguish or apply such decisions to the case in hand.

In *Capital and Counties Bank v. Henty & Sons*, 7 App. Cas. 741, the defendants, who were brewers, had printed a circular in these words: "Messrs. Henty & Sons hereby give notice that they will not receive in payment checks drawn on any of the branches of the Capital and Counties Bank." This circular they sent by post to persons residing in various places in Sussex and neighboring counties, who were either tenants of or purchasers of beer from the defendants. The circular became known to other persons, and there was a run on the bank. The bank sued Henty & Sons for a libel, with an innuendo that the circular imputed insolvency. It appeared in the case that the practice of the defendants had been to collect from time to time, through their travelers, moneys due from their tenants and customers, and to accept payment by checks on local banks. Among the checks which, in the ordinary course of business, were likely to come into the hands of these persons, and which they might be likely from time to time to offer in payment to the defendants, some might be drawn upon the different branches of the plaintiff's bank. The circular, as was said by LORD SELBORNE, related to the defendants' mode of conducting business between them

and their tenants and customers, as to which it was proper that their debtors should be informed, and as the defendants were entitled to decide for themselves what checks they would accept or decline from their debtors, such a communication to their tenants and customers, if made *bona fide*, was privileged. The case, however, was decided in the House of Lords on the question whether the proof was sufficient to sustain the innuendo that the circular imputed insolvency. The court held that the words of the circular, in their natural meaning were not libelous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw, and that the circumstances attending the publication did not show that the circular had a libelous tendency. Speaking of the fact that some of the persons who received the circular did in fact show it to strangers, LORD SELBORNE said: "I do not think that any such communication by them to strangers, unauthorized by the defendants themselves, could properly be evidence in support of the innuendo." He added: "If it had been publicly placarded by the defendants, on the walls of Chichester or other towns, or had been advertised by them in newspapers, or sent by them through the post to persons with whom they had no business relations, this might have been evidence of a malicious intention, beyond what was expressed by the mere words of the document."

The case cited is distinguished from that in hand in the circumstance that the circular in that case did not bear on its face a construction imputing insolvency, and was sent only to persons having an interest in the subject; whereas in this case the statement in the notification sheet plainly affected the plaintiff's financial standing, and was sent to all subscribers promiscuously, without regard to their interest in that subject.

In *Lawless v. Anglo-Egyptian Oil Co.*, L. R. 4 Q. B. 262, an action for libel was brought against a corporation for publishing a report made to the company by auditors in their audit of the managers' account, reflecting upon the plaintiff. The report was submitted at a general meeting of the shareholders of the company, and under a resolution of the meeting was printed and circulated among the shareholders. The court held that inasmuch as it was the interest of all the shareholders to be informed of the report, the printing and such publication of it were privileged on the ground, as was said by MELLOR, J., "that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous." It will be observed that the *gravamen* of the action was the publication to the shareholders, persons immediately interested in the report, and that no other publicity had been given to the defamatory matter except to the printer by whom it had been printed. In *P., W. & B. R. Co. v. Quigley*, 21 How. 202, a report made to stockholders in writing, and

printed, with respect to the capacity and skill of one of the company's employees, the superintendent of the company's railroad, was held to be a privileged communication; but it was also held that the privilege did not extend to the preservation of the report in a book for distribution among the persons belonging to the corporation or the members of the community.

These cases are simply illustrations of the principle that a communication made upon a subject-matter in which the party communicating has a duty is privileged when made to persons having a corresponding interest in it, and they illustrate how carefully the privilege is restricted within the bounds reasonably necessary to effect the communication to the parties actually interested. So strictly is this limitation within reasonable bounds enforced, that in *Williamson v. Freer*, L. R. 9 C. P. 393, the transmission unnecessarily, by a post-office telegram, of libelous matter which would have been privileged if sent in a sealed letter, was held to avoid the privilege, although the post-office clerks through whose hands it would pass were prohibited, under severe penalties, from disclosing telegrams passing through their hands, the principle of the decision being that publication was thus made to persons in respect of whom there was not any privilege. Pollock on Torts, 234.

The defendant's dissemination of the notification sheets among their subscribers as a class, being intentional and in the regular course of their business as it was conducted, it is not necessary to consider whether *Thompson v. Dashwood*, 11 Q. B. Div. 43, in which it was held that a communication intended to be made on a privileged occasion was privileged where, by the sender's negligence in putting letters in wrong envelopes, the communication was sent to a stranger to the occasion, was correctly decided. It will be observed that in *Thompson v. Dashwood* the misdirected letter was sent to the plaintiff's brother, and in fact caused no special injury to the plaintiff. It may also be remarked that Mr. Pollock, in his recent Treatise on Torts, disapproves of this case as a decision by no means universally accepted by the profession as good law, and as contrary to the earlier decisions. Pollock on Torts, 216, 234. A defendant intends to send a communication derogatory to the plaintiff's character or circumstances to A, where it would do no harm. By inadvertence he sends it to B, which produces the injury complained of. It is obvious that it would be a plain transgression of legal principle to excuse the act he did because he intended to do an act from which no injury to the plaintiff would have resulted, and thus visit upon an innocent sufferer the consequences of the heedless act of the wrong-doer which occasioned the injury.

I turn now to the judicial precedents directly in point.

In *Beardsley v. Tappan* the defendant conducted a mercantile agency for furnishing information to subscribers, under rules and regulations

for maintaining the personal and confidential character of communications to subscribers similar to those in the defendant's contract with their subscribers. The plaintiff sued in an action for libel, for communicating false information with respect to the plaintiff's financial condition. The words in question had been entered in the defendant's record book by his clerks and had been read by them to clerks of subscribers sent by their employers to make inquiries. The trial judge instructed the jury that no person other than the merchant himself, asking for information, had in law a right to read or hear said words, and that the reading of said words by any person in defendant's employ, with his permission, or the reading of said words by defendant himself, or by any person in his employ, to the clerk of a merchant subscriber requesting information concerning the plaintiff, was an unlawful publication, not at all within or protected by the rule of law, as to privileged communications. The plaintiff having obtained a verdict, Mr. Justice NELSON, in denying a motion for a new trial on the ground of misdirection, held that the principle upon which privileged communications rest imported confidence and secrecy between individuals, and was inconsistent with the idea of a communication made by a society or congregation of persons, or by a private company or a corporate body. The facts and the charge of the trial judge are reported in 1 Am. Lead. Cas. 205, and the opinion of Mr. Justice NELSON in 5 Blatchf. C. C. 497. The judgment was reversed in the Supreme Court of the United States, no opinion having been expressed on this subject.

The charge of the trial judge and the reasoning of Mr. Justice NELSON place unreasonable restrictions upon the doctrine of privileged communications. Agents to collect information, clerks to record it and to communicate it to subscribers, on the one hand, and confidential clerks to receive the information in the interest and by the authority of subscribers, on the other hand, are absolutely necessary to the usefulness, if not the existence, of these institutions. The employment of clerks who obtain thereby such information as their duties necessitate—like the intervention of the printer where printing a report is, in the judgment of the court, a reasonable method of communicating to a large body of interested persons, as the shareholders of a corporation—does not take from the transaction its character as a privileged communication.

Other cases have placed the subject on more reasonable grounds. In *Ormsby v. Douglass*, 37 N. Y. 477, the defendant kept a mercantile agency, to obtain information respecting the credit and responsibility of persons in trade, and furnish the same to subscribers. A subscriber who held a note against the plaintiff personally applied at the defendant's office for information concerning the plaintiff. The record books were examined by the defendant's clerks, and the information was given.

The statement complained of was made orally to one interested in the information, upon personal application at the defendant's office. The Court of Appeals of New York held the communication to be privileged. On the other hand, the same court held that a communication made by a person engaged in the business of a mercantile agent, to subscribers, which was not confined to such of them as made inquiries of him, but was printed by his procurement and distributed by him to subscribers who had no special interest in being informed of the condition of the plaintiff's firm, was not privileged. *Taylor v. Church*, 4 Seld. 452.

The question was again considered in that state, by the new Court of Appeals, in *Sunderlin et al. v. Bradstreet*, 46 N. Y. 188. The suit was against the proprietors of a mercantile agency. The defendants published a semi-annual volume containing the names of persons and firms doing business in various parts of the United States and Canada, and information in reference to their financial condition, and also a weekly sheet of corrections, which was sent to their subscribers in the city of New York and in the country by mail. In this weekly sheet they published that the plaintiffs had failed. The publication was false. The question was whether the publication was a privileged communication. Mr. Justice ALLEN, in the opinion of the court, said: "A communication is privileged within the rule when made, in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information. . . . In the case at bar it is not pretended that but few, if any, of the persons to whom the ten thousand copies of the libelous publication were transmitted had any interest in the character or pecuniary responsibility of the plaintiffs, and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who, without cause, publish defamatory matters of others; that is, of proving the truth of the publication, or responding in damages to the injured party. The communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false. . . . In those cases in which the publication has been held privileged the courts have held that there was a reasonable occasion or exigency which for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within

the protection of privileged communications. The court held that information communicated, not merely to persons interested in it, but published to all persons who might be subscribers to the scheme of publication, was not privileged.

The decisions in the federal Circuit Courts are in coincidence with those of the courts of New York. *Erber v. Dun*, 12 Fed. Rep. 526; *Trussell v. Scarlett*, 18 id. 214; *Locke v. Bradstreet Co.*, 22 id. 771. Against these authorities I find neither judicial decision nor *dictum*.

I concur in the result reached in *Sunderlin v. Bradstreet*, and in the reasoning upon which the judgment was founded. The defendants can claim no additional privilege in virtue of the business in which they are engaged. Their business is a lawful business, but, as was said by the court in *Sunderlin v. Bradstreet*, "in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others." The publication of defamatory matter affecting third persons, in a business prosecuted for personal gain, can be tolerated only on grounds of public convenience. The rights of individuals ought not to be made to yield to the exigencies of such a business more than public interests require. Public interests will be adequately conserved by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have a special interest in the information. This restriction lays no unreasonable restraint upon the business of these agencies in collecting and communicating information in the interest of the public. Society is organized and courts are established for the protection of the rights of individuals. Unrestrained by those legal principles which control the acts and conduct of other persons under like circumstances, these agencies, in the vastness of their operations, are capable of becoming instruments of injustice and oppression so grievous that public policy would require their entire suppression.

Nor can the defendants acquire a larger measure of immunity by reason of their contracts with their customers to hold the information as confidential. The contract of the defendants with their subscribers is *inter sese*. In fact it affords no protection against injury by false reports. The manner in which these reports are disseminated renders protection to the public under the terms of the subscriber's contracts a delusion. Each of the subscribers has a printed copy to retain in his possession. Myers testified that although not one of the defendants' subscribers, he nevertheless had seen their reports twice a week right along—sometimes only once a week and sometimes twice a week; that during the last ten years he had seen their notification sheets thousands of times, and that any reputable merchant could get hold of their sheets, whether he is a subscriber or not. Others of the plaintiff's creditors

who were not defendants' subscribers testified that they had frequently seen the defendants' notification sheets, and some that they had seen the sheet of November 5th, 1884. The injury to the plaintiff from the false report resulted from the manner in which the defendants disseminated their publications. It has been held that damage occasioned by the unauthorized repetition by a third person of defamatory words uttered orally is too remote to support an action against the original utterer of them, where the words are actionable only by reason of special damage. *Ward v. Weeks*, 7 Bing. 211. This case and the cognate case of *Vicars v. Wilcocks* have been criticized. 2 Smith's Lead. Cas. (8th ed.) 552. The principle held in that case, if sound, has never been applied to written or printed libels, nor is it applicable to defamatory matter published in that manner. The correct principle to apply to such publications is that the original publisher is answerable in law for all the consequences of his wrongful act which were reasonably to be foreseen, and which were the result, in the usual order of things, of such wrongful act. *Hughes v. McDonough*, 14 Vroom, 460; Pollock on Torts, 463.

The rule adopted by the learned judge, in defining the qualifications and limitations upon publications affecting credit and financial standing, which would make such publications privileged communications, was correct. His application of the rule to the facts of this case was as favorable to the defendants as they were entitled to have. His ruling with respect to the liability of the defendants for damages resulting from their wrongful acts was also correct.

The other exceptions have been examined. It is sufficient to say we find in them no error which would justify a reversal.

The judgment should be affirmed.

For affirmance—The Chancellor, Chief Justice, DEPUE, KNAPP, PARKER, BROWN, COLE, MCGREGOR, PATTERSON.

For reversal—DIXON, MAGIE, VAN SYCKEL, CLEMENT, WHITAKER.¹

¹ Dissenting opinion by Van Syckel, J., omitted.

MALICE.**BROMAGE V. PROSSER.**

(4 Barnewall & Cresswell, 247.—1825.)

THIS was an action for words spoken of the plaintiffs in their trade and business as bankers.

In submitting the case to the jury, the judge told them that malice was the gist of the action; that it did not appear from the evidence, that the defendant was actuated by any ill will against the plaintiff; and that if the words were not spoken maliciously, the defendant was not answerable; that they ought, therefore, to find their verdict for the defendant, if they thought that the words were not spoken maliciously, otherwise for the plaintiffs. The jury found a verdict for the defendant. A rule *nisi* for a new trial was obtained on the ground that the judge had improperly left to the jury the question of malice, for it was to be inferred in this case from the act of the defendant, inasmuch as the occasion did not justify the speaking of the words.

BAYLEY, J., now delivered the judgment of the court. This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiff's bank had stopped, the defendant's answer was, "it was true, he had been told so." The evidence was, that Watkins met defendant and said, "I hear that you say the bank of Bromage & Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "it was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." Defendant had been told at Crickhowell, there was a run upon plaintiff's bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned Judge considered the words as proved and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken *maliciously* though they might unfortunately have produced injury to the plaintiffs the defendant ought to have their verdict; but if they thought them spoken *maliciously* they should find for the plaintiff: and the jury having found for the defendant, the question upon a motion for a new trial was

upon the propriety of this direction. If in an ordinary case of slander, (not a case of privileged communication,) want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the Judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That *malice*, in some sense, is the gist of the action, and that, therefore, *the manner and occasion of speaking the words* is admissible in evidence to show they were not spoken *with malice*, is said to have been agreed (either by all the Judges, or at least by the four who thought the truth might be given in evidence on the general issue,) in *Smith v. Richardson*, Willes, 24, and it is laid down (1 Com. Dig. action upon the case for defamation, G. 5,) that the declaration must show a *malicious intent* in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what sense the words *malice* or *malicious intent* are here to be understood, whether in the *popular* sense, or in the sense the law puts upon those expressions, none of these authorities state.

Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. Russell on Crimes, 614 N. 1. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Styles*, 392, and was adjudged upon error in *Mercer v. Sparks*, Owen, 51; Noy. 35. The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the words were themselves malicious and slanderous, and therefore, the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential

advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmondson v. Stevenson*, Bull. N. P. 8, LORD MANSFIELD takes the distinction between these and ordinary actions of slander. In *Weatherstone v. Hawkins*, 1 Term Rep. 110, where a master who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject a detail by letter of certain instances in which the servant had defrauded him; Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrine held in action for words, no express malice need be proved. LORD MANSFIELD said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and BULLER, J., said, this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as *false*. BULLER, J., repeats in *Pasley v. Freeman*, 3 T. R. 61, that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton*, 3 Burr. 2425, LORD MANSFIELD states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author), upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood Watkins, as asking for information for his own guidance, and that the defendant spoke what he did to Watkins, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favor of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slan-

der, we are of opinion, that the question of malice ought not to have been left to the jury. It was, however, pressed upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration, but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration; and had the learned Judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice as a question of fact, for the consideration of the jury; for if the jury should think that when Watkins asked his question, the defendant understood it as asked, in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice in fact will then be a necessary part of the jury's inquiry; but it does not appear that it was left to the jury in this case, to consider whether this was understood by the defendant as an application to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of opinion, that the rule for a new trial must be absolute.

Rule absolute.

CRITICISM.

DAVIS v. SHEPSTONE.

(L. R. 11 Appeal Cases, 187.—1886.)

LORD HERSCHELL, L. C. This is an appeal from a judgment of the Supreme Court of the Colony of Natal refusing a new trial in an action brought against the appellants in which the respondent obtained a verdict for £500 damages.

The action was brought to recover damages for alleged libels published by the appellants in the NATAL WITNESS newspaper in the months of March and May, 1883.

The respondent was, in December, 1882, appointed Resident Commissioner in Zululand, and proceeded in the discharge of his duties to the Zulu reserve territory. In the month of March, 1883, the appellants published in an issue of their newspaper serious allegations with reference to the conduct of the respondent whilst in the execution of his office in the reserve territory. They stated that he had not only him-

self violently assaulted a Zulu chief, but had set on his native policemen to assault others. Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity, observing, "We have always regarded Mr. Shepstone as a most unfit man to send to Zululand, if for no other reason than this, that the Zulus entertain towards him neither respect nor confidence. To these disqualifications he has now, if our information is correct, added another which is far more damnable. Such an act as he has now been guilty of cannot be passed over, if any kind of friendly relations are to be maintained between the colony and Zululand. There are difficulties enough in that direction without need for them to be increased by the headstrong and almost insane imprudence and want of self-respect of the official who unworthily represents the government of the Queen."

In the same issue, under the heading "Zululand," there appeared a statement that four messengers had come from Natal to Zululand, from whom details had been obtained of the respondent's treatment of certain chiefs of the reserved territory who had visited Cetewayo, and, what purported to be the account derived from these messengers of the assault and abusive language of which the respondent had been guilty, was given in detail.

On the 16th of May, 1883, the appellants published a further article, relating to the respondent, which commenced as follows:—"Some time ago, we stated in these columns that Mr. John Shepstone, whilst in Zululand, had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man."

The article then gave at length the statements so taken down, which disclosed, if true, the grossest misconduct on the part of the respondent. It was in respect of these publications of the appellants that the action was brought by the respondent.

The appellants by their defence averred that the conduct of the plaintiff as British Resident Commissioner was a matter of general public interest affecting the territory of Natal, and that the alleged libels constituted a fair and accurate report of the information brought to the Governor of Natal and published in the colony by messengers from Zululand and its King as to the conduct of the plaintiff in the discharge of the duties of his office, and a fair and impartial comment upon the conduct of the plaintiff in his public capacity published *bona fide* and without malice.

The case came on for trial before Mr. Justice WRAGG and a jury on the 4th of September, 1883, when it was proved that the allegations of misconduct made against Mr. Shepstone were absolutely without foundation, and no attempt was made to support them by evidence. It appeared that the messengers from whom the statements contained in the issue in March were derived had come from Zululand to see the Bishop of Natal, and that their statements had been conveyed to the editor of a newspaper by a letter from the bishop. The statements contained in the issue of May were communicated by a Mr. Watson, who was connected with the staff of the newspaper, and who had sought and obtained an interview with certain Zulus when on their way to convey a message from the King to the Governor of Natal.

At the close of the evidence the learned judge summed up the case to the jury, who returned a verdict for the plaintiff, the present respondent, for £500.

Application was afterwards made to the Supreme Court to grant a new trial, but this application was refused, and the present appeal was then brought. The appellants rested their appeal upon two grounds, first, that the learned judge misdirected the jury in leaving to them the question of privilege and in not telling them that the occasion was a privileged one. The second ground insisted upon was that the damages were excessive. Their Lordships are of opinion that the contention that the learned judge ought to have told the jury that the occasion was a privileged one, and that the plaintiff could only succeed on proof of express malice, is not well founded.

There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

In the present case the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege.

It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has, indeed, been held that fair and accurate reports of proceedings in Parliament and in Courts of Justice are privileged, even though they contain defamatory matter affecting the character of individuals.

But in the case of *Purcell v. Sowler*, 2 C. P. D. 215, the Court of Appeal expressly refused to extend the privilege even to the report of a meeting of poor law guardians, at which accusations of misconduct were made against their medical officer. And in their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the Bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants, who for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the governor.

The language used by the learned judge in summing up the present case to the jury is open to some criticism, and does not contain so clear and complete an exposition of the law as might be desired. But in their Lordships' opinion, so far as it erred, it erred in being too favorable to the appellants, and it is not open to any complaint on their part.

The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. And their Lordships see no reason for saying that the damages awarded were excessive or for interfering with the finding of the jury in this respect.

They will, therefore, humbly advise Her Majesty that the judgment appealed against should be affirmed and the appeal dismissed with costs.

Judgment affirmed.

DEFAMATION OF CORPORATION.

REPORTERS' ASS'N. v. SUN PRINTING & PUB. ASS'N.

(186 New York, 437.—1906.)

THE complaint alleges that the plaintiff is a domestic corporation, engaged in the collection and distribution of news items and the publication of a magazine. It sets forth the following matter as having been published in the *Sun*, "concerning the Newsboys' Company and Newsboys' Magazine," namely:

"Roosevelt called police,—and got back his letter from *Newsboy* employees,—Blue Pencil Grafters have exchanged mendicancy for peddling certificates of stock in philanthropic plant.—\$250,000 to sell.—Watch your check book."

"Chief Sylvester made a careful examination of the Newsboys' Company and had its agents shadowed all over the country."

"That many in the concern, among them a woman, had police records."

"The chief of police probably has these records still."

It is then alleged that in the same article the following appeared, namely:

"Washington has been fruitful of checks until this, but thereafter the activity was transferred to this city. The beggars have been busy here ever since. Subscription lists seem to have been exchanged among the 'Press Artists' League,' the 'Reporters' Association of America,' 'The Interstate Press,' and a score of other concerns organized for the same purpose, because the canvassers have always seemed to hit on the same easy marks. One lawyer's check-book shows that since last March he has received visits from representatives of all these concerns."

The innuendo in the complaint is "that the mention of the plaintiff in the publication was made with the malicious intent to defame it" and to lead the public to believe that it was engaged in the same practices as the article had mentioned in connection with the Newsboys' Company. It is then, further, alleged that the publication is wholly false "and has caused to this plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract and has greatly damaged the said plaintiff in credit and reputation, all in the sum of one hundred thousand dollars (\$100,000)."

The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. At the Special Term the demurrer was overruled and, upon appeal to the Appellate Division, that order was affirmed. The affirmance was by a divided court, and, thereafter, leave was given to appeal to this court; this question of law being certified to us: "Does the amended complaint state facts sufficient to constitute a cause of action?"

GRAY, J.—The sufficiency of this complaint depends upon its allegation of the special damage, which the plaintiff claims to have sustained from the alleged libelous publication. That a corporation has the right to maintain an action of libel, when the publication assails its management or credit and inflicts injury upon its business or property, is a proposition which is true upon principle and which has the support of authority. (See Newell on Slander and Libel, p. 360, and cases cited.) It is as much entitled to the protection of the law in those respects as is the natural person. It differs from the latter in that it has no character

to be affected by a libel, but its right to be protected against false and malicious statements affecting its credit or property should be beyond question. There has been some dispute in the cases as to the necessity of setting out the specific damage which a corporation claims to have suffered from a libelous publication, but I regard the better rule to be that such an averment is not necessary when the language is of so defamatory a nature as to directly affect credit and to occasion pecuniary injury. See *Shoe & Leather Bank v. Thompson*, 18 Abb. Pr., 413; *Knickerbocker Ice Co. v. Ecclesine*, 34 Super. Ct. 76; *Union Assoc. Press v. Heath*, 49 App. Div., 247; *Trenton, &c., Ins. Co. v. Perrine*, 3 Zab., N. J., 402). In the present case the learned justices of the Appellate Division are in accord that this publication is not libelous *per se*, and, as I think, correctly. It may well be that the Newsboys' Company and *Newsboys' Magazine*, which are spoken of in the earlier part of the article, might complain of its language, but, as it was observed below, "what is said with respect to the *Newsboys' Magazine* as to 'grafters' and 'police' and 'police records' cannot be said to legitimately refer to this plaintiff." There is no other association of this plaintiff with the Newsboys' Company and *Magazine*, nor other implication of similarity in practices and in police repute than what may be found from both having been spoken of in the course of the article, and it would be going further than common sense allows to infer from that circumstance a necessary connection in disreputable practices. The portion of the article referring to the plaintiff clearly is not libelous *per se*. What does it import to say that "subscription lists seem to have been exchanged among the 'Press Artists' League,' the 'Reporters' Association of America', 'The Interstate Press' and a score of other concerns organized for the same purpose, because the canvassers have always seemed to hit on the same easy marks?" except that the concerns are "beggars" for subscriptions and aid each other in soliciting them through the exchange of lists which show what persons have been successfully approached by each. It has not been considered injurious to a person's character or to his credit that he has importuned for business, and it will not, I believe, be so considered for a business corporation to do so. By reference to the record in *King v. Sun P. & P. Co.*, 84 App. Div., 310, *aff'd* 179 N. Y., 600, to which counsel for the appellant calls our attention, it will be seen that we affirmed an order sustaining a demurrer to a complaint where the libelous article related to plaintiff's efforts to procure subscriptions for, and to effect sales of, the publication of a work of art and to his general business as a publisher. It was much more severe in personal allusions than the present article, but it was not considered libelous *per se*, and the discussion in the courts was upon the sufficiency of the allegations of special damage.

The disagreement of the Appellate Division in this case was upon the

question of the special damage alleged. That special damage must be alleged, the article not being libelous *per se*, was conceded, but the dissent was from the opinion that the allegation was sufficient; that the publication, &c., "has caused to this plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract and has greatly damaged the plaintiff in credit and reputation." Under the settled rule whenever special damage is claimed the plaintiff must state it with particularity in order that the defendant may be enabled to meet the charge (1 Chitty on Plead., 414; Newell on Slander and Libel, 634; *Linden v. Graham*, 1 Duer, 690; *Bassil v. Elmore*, 65 Barb., 627; *Cook v. Cook*, 100 Mass., 194.)

In *Linden v. Graham*, (*supra*,) it was said of an action of slander (and the same rule would apply) that "the special damage must be fully and accurately stated. If the special damage was a loss of customers . . . the persons who ceased to be customers, or who refused to purchase, must be named, and that if they are not named, no cause of action is stated, (1 Selden, 14; *Kendal v. Stone*.)" In *Tobias v. Harland* 4 Wend., 537) the slanderous words were spoken of articles manufactured by the plaintiff, whereby divers persons refused to purchase them. It was held that "the general allegation of the loss of customers is not sufficient to enable the plaintiff to show a particular injury" (English cases being cited), and the demurrer was sustained. In Chitty's Pleading (*supra*, p. 424) it is said: "The general rule is that when the law infers damage and the words are actionable, without special damage, none need be laid in the declaration, but that it is otherwise when the words are only actionable in respect of the particular injury resulting therefrom," and the rule is pertinently illustrated by the author. The reason for the rule should be quite obvious. If the article complained of is not defamatory of itself, damage is not implied in law. But if the plaintiff, nevertheless, charges that damage has actually occurred, as the result of the publication, then he should aver what it was and with such particularity as that it shall appear to be the legal, natural and proximate, if not the necessary, consequence of the article, (*Terwilliger v. Wands*, 17 N. Y., 54). If that were not true no legal cause of action would be shown. Furthermore, particularity in such a case is both proper and necessary, because the facts must be peculiarly within the plaintiff's own knowledge and the defendant should have notice of the cause of complaint to be prepared to meet it (1 Chitty on Plead., 857).

The damage charged in this complaint is a loss in business from the refusal of clients to pay just claims due upon contract. That, however, is in effect a statement that the loss was occasioned by the wrongdoing of a third person, and, therefore, it cannot be the legal and proximate result of the defamation. For a contract debtor to refuse payment of his indebtedness is an illegal act for which the law affords a complete

remedy by an action, in which a full indemnity is presumed. A breach of contract is an illegal act, and it could not be regarded as the legal consequence of the alleged libelous article, (*Kendall v. Stone*, 5 N. Y., 14.)

To allege the loss of some particular contract or the business of some certain persons would charge a specific damage as the consequence of the article which the defendant could prepare to meet upon the trial of the issue. There is that vagueness of language as to the clients, which was condemned in *Linden v. Graham*, (*supra*).

For these reasons I think this complaint failed to state a sufficient cause of action according to the rules of pleading which have been laid down in the books and which commend themselves as being reasonable.

I advise, therefore, that the question certified be answered in the negative; that the order and judgment appealed from be reversed and that the defendant have judgment dismissing the complaint, with costs in all the courts, but with leave, however, to the plaintiff, within twenty days from service of the order and upon payment of the costs, to amend its complaint.

CULLEN, Ch. J., HAIGHT, VANN and WERNER, JJ., concur; HISCOCK, J., concurs on ground last stated in opinion; WILLARD BARTLETT, J., not sitting.

Ordered accordingly.

MALICIOUS PROSECUTION

ESSENTIAL ELEMENTS.¹

MILLER v. MILLIGAN.

(48 Barbour, 30.—1866.)

ACTION for malicious prosecution. Plaintiff was arrested, indicted and tried for having induced a prisoner, in his custody as a deserter from the army, to escape. He was acquitted of the charge. At the trial the court nonsuited the plaintiff, who now applies for new trial.

HOGEBOOM, J. The essential elements of this action are well understood. They consist of a previous *unfounded prosecution* of the plaintiff by the *defendant*, commenced *without probable cause*, conducted with *malice*, and *terminating favorably* to the party prosecuted. *Vanderbilt v. Mathis*, 5 Duer, 304; *Foshay v. Ferguson*, 2 Denio, 617; *Besson v. Southard*, 10 N. Y. 236; *McKown v. Hunter*, 30 N. Y. 627.

In regard to these, the burden of proof rests on the plaintiff, and he must establish each of these several propositions or fail in his action. It is often said, in a general way, that malice and the want of probable cause are the ingredients of the cause of action; but it is plain that the other ingredients are implied or understood to exist. *Vanduzor v. Linderman*, 10 Johns. 106; *McCormick v. Sisson*, 7 Cow. 715; *Bulkeley v. Smith*, 2 Duer, 261; *Von Latham v. Rowan*, 17 Abb. Prac. 238, 248; *McKown v. Hunter*, 30 N. Y. 627.

Thus, in general, very little is said about the defendant having been the prosecutor, because the question ordinarily is not the subject of dispute, and because, generally, the defendant was the adverse party in the action or proceeding which constituted the gravamen of the action for malicious prosecution. But it plainly lies at the very foundation of this action that the plaintiff must show that the *defendant*, and not somebody else, has prosecuted him,—has been the *real party*, in fact,

¹ "The plaintiff, to maintain the action, must show that the prosecution was instigated by the defendant, that it has been determined in his favor, that there was no probable cause and that the defendant acted from malice." *Wass v. Stephens*, 128 N. Y. 123, 127.

who has set on foot and conducted the proceedings against him. This prosecution may have been in the form of a civil action, or of a criminal proceeding; and, when not conducted in the *name* of the offending party, it would doubtless suffice to prove that he was the *real* party,—the *mover* and *manager* and *controller* of the prosecution. If he were the mere *clerk* or *agent* of others, or a mere *witness* in the transaction, he would not hold the character nor be liable to the penalties of a malicious prosecutor.

So the plaintiff must aver and prove that the prosecution claimed to be malicious is terminated in his favor. *Gorton v. De Angelis*, 6 Wend. 418; *Clark v. Cleveland*, 6 Hill, 344; *Hall v. Fisher*, 20 Barb. 441.

Proof that the prosecution complained of was instituted through *actual malice* is not enough to sustain the action. *Foshay v. Ferguson*, 2 Denio, 617. In an action for malicious prosecution, the plaintiff must allege and prove *both* malice and a want of probable cause for the former suit. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious. Want of probable cause and malice must concur, and the former cannot be inferred from any degree of malice which may be shown. *Besson v. Southard*, 10 N. Y. 236; *Bulkeley v. Smith*, 2 Duer, 261.

I allude to these familiar rules, not for the purpose of establishing their existence, but merely to bring to mind how strict and exacting the courts have been in enforcing them.

In the present case I was of opinion at the trial that, in two at least of the particulars essential to constitute the cause of action, there was a lack of evidence to justify a recovery, and I am still of the same opinion. . . . The defendant has, I think, shown probable cause for the prosecution if he is its author, and the plaintiff (which is the real question) has not shown the want of probable cause for the charge. On both of the grounds, the absence of proof to show that the defendant was the real prosecutor, and, if so, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge, I am of opinion that the plaintiff was properly nonsuited, and had no legal right to ask a submission of the facts to the jury. . . .

I think no legal error was committed at the circuit, and that a new trial should be denied, and the defendants have judgment.¹

¹ Concurring opinion by Miller, J., and dissenting opinion by Ingalls, J., omitted.

*INSTITUTION OF PROCEEDINGS.***HALBERSTADT v. NEW YORK LIFE INSURANCE CO.**

(104 New York, 1.—1900.)

APPEAL by permission on certified questions from an order of the Appellate Division, reversing an interlocutory judgment of the Supreme Court sustaining plaintiff's demurrer to the second and third defenses of the answer and overruling his demurrer, and from the interlocutory judgment entered on said order.

The questions certified are:

First. Whether the matter set up as a second, further and separate defense in the paragraphs numbered III and IV in the answer is insufficient in law upon the face thereof to constitute a defense to the complaint.

Second. Whether the matter set up as a third, further and separate defense in the paragraphs numbered III, IV and V in said answer is insufficient in law upon the face thereof to constitute a defense to the complaint.

The action is brought to recover damages for an alleged malicious prosecution claimed to have been instituted by the respondent against the appellant in Mexico. It is in the complaint, amongst other things, alleged that the respondent through its agent in the Criminal Court of the City of Mexico, charged the appellant with the crime of embezzlement, "and thereupon and in and by virtue of said charge and the institution of said criminal proceedings a warrant was issued by said court for the arrest of the plaintiff in this action," and that thereafter "the said criminal proceedings for the punishment of said plaintiff were dismissed and extinguished and the said prosecution was thereby wholly determined . . . in favor of the plaintiff."

The respondent, by its second defense, which is challenged here for insufficiency, alleged in substance that before the warrant referred to in the complaint could be served upon the appellant and before he could be apprehended, "he left the Republic of Mexico and thereafter continuously remained absent . . . and by such absence avoided being arrested under such warrant or being tried . . . but remained absent from said Republic of Mexico for a sufficient period of time to enable him to procure the dismissal of said proceedings under the law of Mexico on account solely of the lapse of time." and conversely, that said criminal proceedings "were not dismissed on account of a determination of the case in favor of the plaintiff on the trial thereof on the merits, nor was it dismissed for failure to prosecute said case

except as above set forth, nor was it dismissed on account of any withdrawal of the complaint."

The third defense, also challenged, repeats the foregoing allegations and alleges that "the departure of the plaintiff . . . was for the purpose of avoiding arrest, and by so absconding the said plaintiff did avoid arrest," and in substance that he did so for the purpose and with the result of procuring a dismissal of the criminal proceeding in accordance with the laws of Mexico on account of the lapse of time alone, and "by reason of the premises said plaintiff could not be brought to trial and was never tried in said court to answer to said charge."

HISCOCK, J. This appeal involves interesting questions in an action for malicious prosecution raised by demurrer to certain affirmative defenses which have been pleaded.

The respondent's first reply to the appellant's attack upon its answer is of the *tu quoque* nature, it insisting that the complaint is as deficient in the statement of a good cause of action as the answer is alleged to be in the statement of a good defense. This contention is based upon the fact that the complaint does not allege any act subsequent or in addition to the mere issuance of a warrant in the criminal proceeding complained of; does not allege that the warrant was ever executed in any way whatever, or that the appellant was ever actually brought into said proceedings either by force of process or voluntary appearance. Therefore, the question is presented whether the mere application for and issuance to a proper officer for execution of a warrant on a criminal charge institutes and constitutes such a prosecution as may be made the basis of a subsequent civil action by the party claimed to have been injured.

This question does not seem to have been settled by any decision which we regard as controlling on us.

The respondent cites the following authorities deciding it in the negative: *Newfield v. Copperman*, Spl. Term 15 Abb. Pr., N. S. 360; *Lawyer v. Loomis*, 3 T. & C. 393; *Cooper v. Armour*, 42 Fed. Repr. 215; *Hayward v. Cuthbert*, 4 McCord, S. C., 354; *O'Driscoll v. McBurney*, 2 Nott. & McCord, S. C., 55; *Bartlett v. Christliff*, 14 Atlantic Repr. 518; *Gregory v. Derby*, 8 C. & P. 749; *Paul v. Fargo*, 84 App. Div. 9.

The case last cited was concerned with an alleged malicious prosecution by means of civil process, and what was there said must be interpreted with reference to that fact, and thus interpreted it is not applicable here. Of the other cases only two, *Hayward v. Cuthbert* and *Cooper v. Armour*, considered the question here involved with sufficient thoroughness to require brief comment. An examination will show that the decision in each of them rested in whole or part on a principle, not, as I believe, adopted in this State. In the former, it was said that

"the foundation of this sort of action is the wrong done to the plaintiff by the direct detention or imprisonment of his person." As I think we shall see hereafter, that is not a correct statement of the law in this State. In the other case it was stated: "The only injury sustained by the person accused, when he is not taken into custody and no process has been issued against him, is to his reputation, and for such an injury the action of libel or slander is the appropriate remedy and would seem to be the only remedy." I think that this doctrine, which if correct would provide an adequate remedy outside of an action for malicious prosecution for an injured party in a case where no warrant had been executed, also is opposed to the weight of authority both in this State and elsewhere hereafter to be referred to.

The authorities holding to the contrary on the question above stated and that the execution of the warrant is not necessary to lay the foundation for an action of malicious prosecution are: Addison on Torts, vol. 2, 4th Eng. ed., p. 478, Newell on Malicious Prosecution, sec. 30, Stephens on Malicious Prosecution, Am. ed., sec. 8, *Stapp v. Partlow*, Dudley's Repts., Ga., 176; *Clarke v. Postan*, 6 C. & P. 423; *Feazle v. Simpson*, 2 Scammon's Ill. Repts. 30; *Britton v. Granger*, 13 Ohio Cir. Ct. Repts. 281, 291; *Holmes v. Johnson*, Bushbee's N. C. Repts. 44; *Coffey v. Myers*, 84 Ind. 105.

And to the like effect in the absence of special statutory provisions is *Swift v. Witchard*, 103 Ga. 193.

Thus it is apparent, as before stated, that there is no controlling decision on this question, and we are remitted to a search for some general considerations which may be decisive. It seems to me that these may be found and that they favor the view that a prosecution may be regarded as having been instituted even though a warrant has not been executed.

The first one of these considerations is found in the rule applied in civil actions and proceedings to an analogous situation. There it has many times been held that the mere issue of various forms of civil process for service or other execution is sufficient independent of statute to effect the commencement of a case or proceeding. *Carpenter v. Butterfield*, 3 Johns. Cases, 146; *Cheetham v. Lewis*, 3 Johns. 42; *Bronson v. Earl*, 17 Johns. 63; *Ross v. Luther*, 4 Cowen, 158; *Mills v. Corbett*, 8 How. Pr. 500; *Hancock v. Ritchie*, 11 Ind. 48, 52; *Howell v. Shepard*, 48 Mich. 472; *Webster v. Sharp*, 116 N. C. 466, 471.

I see no reason why a similar rule should not be applied to criminal proceedings, at least for the purposes of such an action as this.

Then there is another reason resting on justice which seems to me to lead us to adopt this conclusion. In opposition to what was said in the South Carolina case already referred to, the sole foundation for an action of malicious prosecution is not "the wrong to the plaintiff

by the direct detention or imprisonment of his person." In an action for false imprisonment that would be so. But in an action of the present type, the substantial injury for which damages are recovered and which serves as a basis for the action may be that inflicted upon the feelings, reputation and character by a false accusation as well as that caused by arrest and imprisonment. The former "indeed is in many cases the gravamen of the action." *Sheldon v. Carpenter*, 4 N. Y. 579, 580; *Woods v. Fennel*, 13 Bush, Ky., Repts. 628; *Townsend on Slander*, sec. 420; *Wheeler v. Hanson*, 161 Mass. 370; *Gunderman v. Buschner*, 73 Ill. App. 180; *Lawrence v. Hagerman*, 56 Ill. 68; *Davis v. Seeley*, 91 Iowa, 583.

But no matter how false and damaging the charge may be in a criminal proceeding upon which a warrant may be issued, damages for the injury caused thereby cannot under any ordinary circumstances be recovered in an action for libel or slander. *Howard v. Thompson*, 21 Wend. 319, 324; *Woods v. Wiman*, 47 Hun, 362, 364; *Sheldon v. Carpenter*, *supra*; *Dale v. Harris*, 109 Mass. 193; *Gabriel v. McMullin*, 127 Iowa, 427; *Hamilton v. Eno*, 81 N. Y. 116; *Newell on Malicious Prosecution*, sec. 10.

Therefore it follows that a person who has most grievously injured another by falsely making a serious criminal accusation against him whereon a warrant has been actually issued may escape all liability by procuring the warrant at that point to be withheld unless an action for malicious prosecution will lie. It seems to me that under such circumstances we should hold that such action will lie, if for no other reason than to satisfy that principle of law which demands an adequate remedy for every legal wrong.

Deciding, therefore, that the appellant's complaint does state a cause of action, we are brought to the direct consideration of the respondent's answer. I do not think that there is such substantial difference between the two defenses which are questioned as calls for any separate treatment of them. Liberally construed, as the pleader is entitled to have them in the face of a demurrer, each one amounts to this, that the appellant fled from Mexico before the warrant could be served on him for the purpose of avoiding service, and remained out of the country and beyond the jurisdiction of the court for such a length of time that the criminal proceeding was finally dismissed, presumably because prosecution was not and could not be carried on. The question is whether a dismissal or discontinuance of a criminal proceeding under such circumstances is that kind of a termination which will support an action for malicious prosecution. If it is, the answers are bad; otherwise not.

While it is elementary that a criminal proceeding must be terminated before an action for malicious prosecution can be begun, there has been much discussion of the nature of this necessary termination. The best

idea of what is essential may be gathered by reference to some pertinent authorities.

In *Wilkinson v. Howell*, 22 E. C. I. R. 368; 1 M. & M. N. P. 495, it appeared that the court in the criminal proceeding complained of had ordered a *stet processus* with the consent of the parties. It was said by LORD TENTERDEN "that the termination (of the criminal proceeding) must be such as to furnish *prima facie* evidence that the action was without foundation" and that the termination in question did not furnish any such evidence.

In *McCormick v. Sisson*, 7 Cowen, 715, 717, criminal proceedings were suspended because the parties declared that they had settled all matters of difficulty between them. The court held that there was no proper termination of the proceeding saying: "It is essential that the plaintiff prove he has been acquitted. The discharge must be in consequence of the acquittal. The action cannot be sustained unless the proceedings are at an end by reason of an acquittal."

In *Gallagher v. Stoddard*, 47 Hun, 101, it appeared that the plaintiff after being arrested paid the officer having him in custody some money, which was receipted for by the defendant and the officer, and he was thereupon discharged. It was held that this was not enough.

In *Atwood v. Beirne*, 73 Hun, 547, it appeared that there had been cross criminal proceedings and it was arranged that the respective complainants should be absent on the days to which the proceedings were adjourned and each complaint thus fell for want of prosecution. It was held that this was not a sufficient termination to support a subsequent action for malicious prosecution.

In *Jones v. Foster*, 43 App. Div. 33, 35, it was said that the theory on which such an action as this is sustainable "is that the proceeding out of which the action arose has terminated successfully to the defendant, exonerating him from the charge made."

In *Leyenberger v. Paul*, 40 Ill. Ct. App. 516, it was established that there had been an adjournment of the criminal proceedings to a certain day, and that the attorney for the defendant in that proceeding, in violation of his agreement, went before the magistrate and procured the dismissal of the charge for want of prosecution. It was held that this was not sufficient, the court saying: "But a *nolle prosequi* by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right or sought for as a favor, is not enough. . . . The principle of the cases is that the discharge or acquittal must be by judicial action under such circumstances as that the party accused has not avoided or prevented judicial investigation."

And it has been held in many different jurisdictions, under varying circumstances, that the entry of a *nolle prosequi* by the prosecuting officer or the termination of a criminal proceeding by the procurement

of the party prosecuted or by his consent or by way of compromise is not such a termination of a prosecution as will enable the party thereby discharged to maintain an action for malicious prosecution. *Langford v. B. & A. R. R.*, 144 Mass. 431; *Russell v. Morgan*, 24 R. I. 134; *Craig v. Ginn*, 94 Am. State Repts. 77; *Welch v. Cheek*, 115 N. C. 310; *Marcus v. Bernstein*, 117 N. C. 31; *Holliday v. Holliday*, 123 Cal. 26; *Rosenberg v. Hart*, 133 Ill. App. 262; *Monbourg v. Smith*, 11 Kan. 417.

From all of these authorities, added to others which are more familiar, I think two rules fairly may be deduced. The first one is that where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety of the proceeding or by a dismissal or discontinuance based on some act chargeable to the complainant as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution. The other and reverse rule is that where the proceeding has been terminated, without regard to its merits or propriety, by agreement or settlement of the parties or solely by the procurement of the accused as a matter of favor or as the result of some act, trick or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for his prosecution. In the other case no such implication reasonably follows. (Townsend on Slander, sec. 423.)

When we apply these rules to the defenses which have been pleaded it is evident that they sufficiently allege a termination of the Mexican proceeding, which is not of a character to sustain this action, and ought not to be. That proceeding came to a dismissal and end not because of any judicial action in favor of the accused for lack of merits or because of a withdrawal or abandonment of it by the prosecuting party, but simply because the defendant therein succeeded in escaping from the country and eluding the jurisdiction of the court and thereby preventing a prosecution. He by his flight, as in other cases the accused had done by agreement, settlement or trick, prevented a consideration of the merits, and he ought not now to be allowed to claim that there were no merits.

In some of the cases refusing to allow the maintenance of such an action as this by a party who had procured a discontinuance of criminal proceedings by settlement it has been said that the reason for such rule is that such settlement was so far a recognition of the propriety of the proceeding that a party making it is subsequently estopped from questioning them. It may be that the conduct of the present appellant in

fleeing from Mexico was discreet or even justifiable by virtue of facts which do not appear to us. At the present time, however, it does not to my mind carry any such presumption of innocence in connection with the termination of the proceedings in that country as impliedly condemns them for having been instituted maliciously and without ground.

In opposition to these views it is insisted by appellant that there is a line of cases which treats the discharge of the defendant in the criminal proceeding as a mere technical condition precedent to the action for malicious prosecution and sustain his theory that the dismissal of the proceeding against him was sufficient for the purposes of this action, specific reference being made to the cases of *Clark v. Cleveland*, 6 Hill, 344; *Moulton v. Beecher*, 8 Hun, 100; *Fay v. O'Neill*, 36 N. Y. 11; *Coffey v. Myers*, 84 Ind. 105, and *Robbins v. Robbins*, 133 N. Y. 597.

A brief review of these cases seems proper.

In the first one the person arrested was released from custody on void bail proceedings. He appeared in accordance with the terms of the latter at a Court of General Sessions, but the complainant did not appear and no subsequent steps were taken under the warrant. While some general observations were made with reference to the necessary ending of a criminal prosecution, I discover nothing opposed to the principles already stated, and it was held in that case that there had not been a sufficient ending of the prosecution to sustain an action for malicious prosecution.

In the *Moulton* case it appeared that the criminal charge complained of had been terminated in plaintiff's favor by the entry of a *nolle prosequi* on motion of the district attorney "after consulting with defendant and in compliance with his request." This was clearly a sufficient termination.

Fay v. O'Neill simply holds that the abandonment of a criminal charge and a discontinuance of the prosecution is equivalent to a discharge from the accusation so as to support an action for malicious prosecution.

The *Indiana* case is thought to be especially applicable, because there the accused had fled from the jurisdiction of the criminal court, and the complaint showing this fact was challenged by demurrer and still held good. The complaint in that case, however, stated a very different termination of the proceeding from that outlined in the present answer, it being expressly alleged that the criminal charge was false; that the defendant fled because of a conspiracy formed which would prevent him from establishing his innocence, and that the proceeding was dismissed because the originators thereof "became satisfied that they could not maintain the prosecution."

It is, however, the *Robbins* case upon which the appellant most relies.

In that case it appeared that the accused had been discharged in the criminal proceedings after a hearing by a police justice, and the only question was whether she was discharged because there was no sufficient evidence against her or whether she was erroneously discharged as a matter of sympathy upon her promise of good behavior. This question was one of fact for the jury, which presumably resolved it in favor of the plaintiff. But even if the justice under the circumstances was actuated by erroneous or improper motives in discharging her, it nevertheless beyond any question was a sufficient termination of the proceeding under all of the authorities bearing on that subject, and on either theory the basis was laid for an action of malicious prosecution. Under these circumstances the learned judge who wrote the opinion made use of some expressions which interpreted by themselves are quite broad and general and are quite confidently quoted by this appellant. He said, among other things: "It cannot in reason make any difference how the criminal prosecution is terminated, provided it is terminated. . . . The circumstances under which she (the plaintiff in that case) is discharged may furnish competent evidence upon the issue of probable cause and malice, and on the question of damages . . . the termination of the criminal proceeding is a mere technical matter, in no way concerning the merits of the action, and is a mere condition precedent to its maintenance" (p. 600.)

In my opinion these remarks should not be construed as meaning and were not intended to mean what the appellant claims. For instance, it is not possible that it was intended to disregard the entire current of authority that a termination of criminal proceedings by agreement or settlement is not such an one as will support an action for malicious prosecution, and yet literally the language employed would include that case. We must construe the language used by Judge EARL in the light of the events he was considering, and these were the discharge of an accused by a magistrate acting judicially, even though erroneously, after a hearing. This was what the judge had in mind when, after discussing the effect of a conviction, he mentioned the other termination resulting "favorably to the accused or without his conviction," as sufficient. And when he said "it cannot in reason make any difference how the criminal prosecution is terminated provided it is terminated" he immediately referred as illustrating his meaning to the case then in hand, where the accused had been duly discharged by the justice, although, as claimed, erroneously. Termination as the result of judicial consideration and decision was what he was talking about, and this was the kind he contemplated when with his concluding words he said: "Therefore any termination such as we have above mentioned as a general rule furnishes the condition precedent" (p. 600).

Therefore I think that these cases do not either singly or collectively

sustain the burden which appellant has sought to impose especially upon them of furnishing an authority for the reversal of the order appealed from, and for all the reasons stated the latter should be affirmed, with costs, and the questions certified to us answered in the negative.

VANN, J.—I concur in the result because there was merely an attempt to prosecute with no actual prosecution. The Mexican court did not acquire jurisdiction of the person of the plaintiff, for he was not arrested, nor was process or notice of any kind served upon him. He was not brought into court and the prosecution could not end because it was never begun. He could not be a party defendant until he was notified or voluntarily appeared. He was threatened with prosecution, but neither his person nor his property was touched. There can be no prosecution unless knowledge thereof is brought home to the alleged defendant in some way. If there had been a prosecution commenced the crime could not have outlawed during the defendant's absence, as is admitted of record. While in civil actions, in order to arrest the Statute of Limitations, "an attempt to commence an action in a court of record is equivalent to the commencement thereof," still the attempt goes for naught unless followed by service, actual or constructive, within sixty days (Code Civ. Proc., sec. 399). The rule was similar at common law. Although in order to prevent injustice an action was deemed to be commenced by the delivery of process for service, it was never treated as effectual for any purpose unless actual service was subsequently made. The authorities cited in the prevailing opinion illustrate this proposition.

In the absence of controlling authority, which it is conceded does not exist, I favor restricting rather than enlarging the scope of the action. This accords with the general position of the court upon the subject.

GRAY, HAIGHT and CHASE, JJ., concur with HISCOCK, J.; CULLEN, Ch. J., and WILLARD BARTLETT, J., concur with VANN, J.

Order affirmed.

TERMINATION.¹

FISHER v. BRISTOW.

(1 Douglas, 215.—1779.)

ACTION for a malicious presentment (for incest), in the ecclesiastical court of the archdeaconry of Huntingdon. *Demurrer* to the *declaration* and cause assigned, that it was not stated how the prosecution was disposed of, or that it was not still depending. The court were clearly of opinion, that the objection was fatal, and said it was settled, that the plaintiff in such an action, must show the original suit, wherever instituted, to be at an end; otherwise he might recover in the action, and yet be afterwards convicted on the original prosecution.

Judgment for the defendants.

BUMP v. BETTS.

(19 Wendell, 421.—1838.)

ACTION on the case for malicious prosecution.

The defendant, in the absence of the plaintiff, obtained an attachment against his property on the allegation that the plaintiff had departed the county in which he had resided, with the intent to defraud his creditors, obtained a judgment against him in the proceeding thus commenced, sued out an execution and sold the property of the plaintiff. The plaintiff gave evidence going to show that the demand on which the judgment was obtained had been paid by him previous to the institution of the proceedings. On a motion for a nonsuit, the judge ruled that the judgment obtained by the defendant remaining unreversed, rebutted the presumption of want of probable cause arising from the fact of payment; that there was no malice shown, and that the plaintiff must be nonsuited. A nonsuit was accordingly entered, and a motion was now made to set it aside.

By the Court, NELSON, Ch. J. This action lies against any person who maliciously and without probable cause prosecutes another, whereby the party prosecuted sustains an injury either in person, *property*, or

¹ "The real foundation of the action is the malicious prosecution without probable cause, and the termination of the criminal proceeding is a mere technical matter in no way concerning the merits of the action and is a mere condition precedent to its maintenance." *Robbins v. Robbins*, 133 N. Y. 597, 600.

reputation. 1 Selw. 806; Saund. Pl. & Ev. 651; 2 Chitty's Pl. 248, n. r. 12 Mod. 208; 1 Salk. 12; 1 T. R. 493, 551.

As a general rule, the plaintiff must aver in his declaration, and prove on the trial the determination of the former suit in his favor, Saund. Pl. & Ev. 858; 2 Chitty's Pl. 245, n. e. though the omission of the averment would be cured after verdict. 1 Saund. 228, b. n. 1. See also 3 Camp. 61, n. 1. The reason for this proof is obvious, for otherwise he might recover in this action, and still be convicted, or have judgment against him in the former suit. Doug. 215. But it does not apply where the malicious prosecution complained of arises out of proceedings on *attachment* in the absence of the party defendant, in which no opportunity is afforded him to defend the suit. A judgment against him under such circumstances, cannot be deemed conclusive evidence of probable cause, or want of malice, as in cases of personal service of process. The rule was first laid down in reference to these cases, and when thus confined, is a sound one, but altogether inapplicable in respect to alleged malicious suits under this new statute remedy given to a plaintiff. The reason of the rule ceasing, the rule itself should give way, and must, or this mode of redress for a wrong more likely to be committed in *ex parte* proceedings than in litigated cases, must be denied. It is obvious the damage to the party in the former instance, will usually be much more serious than in the latter: in the one case there will be a recovery against him for such amount as his adversary, on an *ex parte hearing*, thinks proper to demand; whilst in the other he is subjected only to the costs of a defense.

New trial granted, costs to abide the event.

CARDIVAL v. SMITH.

(109 Massachusetts, 153.—1872.)

THE declaration alleged that the defendant, in a civil action, maliciously and without probable cause procured the arrest of the plaintiff and his holding to bail on a writ returnable at a certain term of the Superior Court; that the plaintiff duly appeared, but the defendant did not appear, nor was said writ ever entered. To this the defendant demurred on the ground that no determination of the former suit was shown. The demurrer was sustained and the plaintiff appealed.

GRAY, J. The general rules of law governing actions for malicious arrest and prosecution have long been well settled. In the words of LORD CAMDEN, "this is an action for bringing a suit at law; and courts

will be cautious how they discourage men from suing; when a party has been maliciously sued and held to bail, malice, and that it was without any probable cause, must be alleged and proved." *Goslin v. Wilcock*, 2 Wils. 302, 307. "The new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust." Bul. N. P. 12.

When the prosecution alleged to have been malicious is by complaint in behalf of the government for a crime, and in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown; and a *nolle prosequi* entered by the attorney for the government is not sufficient; for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint. Bul. N. P. 14; *Bacon v. Towne*, 4 Cush. 217; *Parker v. Farley*, 10 Cush. 279; *Bacon v. Waters*, 2 Allen, 400. But if it is commenced by complaint to a magistrate who has jurisdiction only to bind over to discharge, his record, stating that the complainant withdrew his prosecution and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal. *Sayles v. Briggs*, 4 Met. 421, 426. If the accused, after being arrested, is discharged by the grand jury's finding no indictment, that shows a legal end to the prosecution. *Jones v. Given*, Gilb. 185, 220; BULLER, J., in *Morgan v. Hughes*, 2 T. R. 225, 232; *Freeman v. Arkell*, 2 B. & C. 494; S. C., 3 D. & R. 669; *Michell v. Williams*, 11 M. & W. 205; *Bacon v. Waters*, 2 Allen, 400. And if the prosecutor, after procuring the arrest, fails to enter any complaint, this with the attending circumstances is sufficient to be submitted to the jury as evidence of want of probable cause. *Venafrá v. Johnson*, 10 Bing. 301; S. C., 3 Moore & Scott, 847, and 6 C. & P. 50; *McDonald v. Rooke*, 2 Bing. N. C. 217; S. C., 2 Scott, 359.

When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient termination of the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and after entering his action, becomes nonsuit, or settles the case upon receiving part of the sum demanded, an action for a malicious prosecution may be maintained against him. *Nicholson v. Coghill*, 4 B. & C. 21; S. C., 6 D. & R. 12; *Watkins v. Lee*, 5 M. & W. 270; *Ross v. Norman*, 5 Exch. 359; *Bicknell v. Dorion*, 16 Pick. 478, 487; *Savage v. Brewer*, id. 453. In *Arundell v. White*, 14 East, 216, it was held that an entry in the minute book of the sheriff's court in London, opposite the entry of a suit in that court, that it was withdrawn by the plaintiff's order, was sufficient evidence of a termination of that suit to sustain an action for malicious prosecu-

tion. In *Pierce v. Street*, 3 B. & Ad. 397, the declaration, after setting out the suing out of a writ in an ordinary action at law against the plaintiff, and an arrest and holding to bail thereon, and alleging that it was done maliciously and without probable cause, averred that no proceedings were thereupon had in that action, and that the plaintiff therein did not declare against the defendant nor prosecute his suit against him with effect, but voluntarily permitted the action to be discontinued for want of prosecution thereof, whereupon and whereby, and according to the practice of the court, the suit became determined. At the trial of the action for malicious arrest, it appeared that no declaration was delivered or filed in the former action, and that this action was not commenced until a year after the return day of that. It was objected that, there being no judgment of court, there was no evidence of the determination of the suit, to satisfy the averment in the declaration. But LORD LYNCHURST, C. B., thought there was, and overruled the objection; and this ruling was confirmed by the court of Queen's bench; LORD TENTERDEN, C. J., saying, "The length of time which had elapsed shows that the suit was abandoned altogether;" and PARKE, J., "When the cause is out of court, it must be considered as determined." Our own statutes expressly provide that, if no declaration is inserted in the writ, or filed before or at the return term, it shall be a discontinuance of the action. Gen. Sts. c. 129, § 9.

But the present case does not require us to consider what disposition must be shown of a civil action which has once been entered in court, in order to constitute a full determination thereof. A plaintiff cannot be compelled to enter his action, and, until he does, may judge for himself whether he will proceed with it or not. If he does not enter it, it never comes before the court, nor becomes the subject of any judgment, nor appears on its records, unless the defendant, upon filing a complaint at the return term, obtains judgment for his costs. If the defendant does not make such a complaint, the action is not the less finally abandoned and determined by the neglect of the plaintiff to proceed with it. *Clark v. Montague*, 1 Gray, 446, 448; *Lombard v. Oliver*, 5 Gray, 8; *Jewett v. Locke*, 6 Gray, 233. The only cause assigned for the demurrer being that the declaration shows no determination of the former suit in favor of the defendant therein by a judgment of court, it must be

Overruled.

WOODMAN v. PRESCOTT.

(66 New Hampshire, 375.—1891.)

ACTION for malicious prosecution. Verdict for plaintiff.

At the October term, 1885, the grand jury, on the complaint of the defendant, returned an indictment against the plaintiff for larceny, (under Gen. Laws, c. 278, § 11), alleged to have been committed, and which was committed, if at all, in March, 1880. A *nolle prosequi* was entered at the October term, 1886. The plaintiff has always resided in this state. There was evidence tending to show that the defendant had no knowledge of the facts on which the prosecution was founded until 1885, and that the *nolle prosequi* was entered because Prescott did not receive notice of the time fixed for the trial in season to procure the attendance of the witnesses for the state; but the plaintiff claimed the fact to be otherwise. At the close of the plaintiff's argument to the jury, the defendant requested the court to rule that the entering of a *nolle prosequi* was not a sufficient termination of the prosecution to entitle the plaintiff to maintain the action. The court denied the request, and the defendant excepted.

CLARK, J. To maintain an action for malicious prosecution, the plaintiff must show that the proceeding complained of as malicious was instituted without probable cause, and is ended. "The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust." Bull. N. P. 12. If the first action is still pending, or if there has been a judgment against the plaintiff, or if he has terminated the suit by paying what was demanded, (unless the payment was made under duress, *Morton v. Young*, 55 Me. 24), or by compromise, he cannot be admitted to say that the action was commenced without probable cause, and consequently cannot have an action for malicious prosecution. If there has been a judgment in the plaintiff's favor, or the nature of the proceeding was such that he had no opportunity to make a contest and obtain a decision in his favor, as where one maliciously causes another to be arrested and held to bail in a civil action, and fails to enter the action (*Cardinal v. Smith*, 109 Mass. 158), he may bring an action for malicious prosecution.

Whether the entry of *nolle prosequi* is a sufficient termination of a criminal suit to allow the party prosecuted to commence an action for malicious prosecution is a question upon which the authorities are not uniform. In Massachusetts it is held that such an entry is not necessarily sufficient, and it is said "that whether a prosecution has been so terminated as to authorize the party prosecuted to commence an action

for malicious prosecution is to be determined by the facts of the particular case, of which facts the entry of *nolle prosequi* may be one of several, may be the only fact, may be a controlling fact, or may be an entirely unimportant one." *Graves v. Dawson*, 130 Mass. 78. In *Langford v. Railroad Co.*, 144 Mass. 431, MORTON, C. J., says: "The entry of a *nolle prosequi* by the district attorney of his own motion, followed by a discharge of the accused party by the court, may be such a termination of the prosecution as will enable the party to maintain an action for malicious prosecution." And it is held that a discharge by a magistrate having only authority to bind over is a sufficient termination of the proceedings. *Moyle v. Drake*, 141 Mass. 238, 242.

In other jurisdictions the entry of a *nolle prosequi* is held to be sufficient. *Stanton v. Hart*, 27 Mich. 539; *Hatch v. Cohen*, 84 N. C. 602; *Brown v. Randall*, 36 Conn. 56; *Apgar v. Woolston*, 43 N. J. Law, 57. In the latter case it is said: "No action for a malicious prosecution can be brought while the criminal proceedings are pending. When the criminal prosecution is ended, if it terminates in favor of the accused, he may then maintain his action for a malicious prosecution. Except to confer on the accused the capacity to sue, the manner in which the prosecution terminated is immaterial. The law requires only that the particular prosecution complained of shall have been terminated, and not that the liability of the plaintiff to prosecution for the same offense shall have been extinguished, before the action for malicious prosecution is brought. Consequently the refusal of the grand jury to find an indictment, a *nolle prosequi*, or any proceeding by which the particular prosecution is disposed of, in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*, is a sufficient termination of the prosecution to enable the plaintiff to bring his action." So, also, Judge COOLEY says: "The reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." Cooley, Torts, 186, citing *Clark v. Cleveland*, 6 Hill, 344, 347; *Cardinal v. Smith*, 109 Mass. 159; *Driggs v. Burton*, 44 Vt. 124; *Leever v. Hamill*, 57 Ind. 423.

The rule supported by reason and authority seems to be that if the proceeding has been terminated in the plaintiff's favor, without procurement or compromise on his part, in such a manner that it cannot be revived, it is a sufficient termination to enable him to bring an action for a malicious prosecution.

Exceptions overruled.

WANT OF PROBABLE CAUSE.

FOSHAY v. FERGUSON.

(2 Denio, 617.—1846.)

ACTION for malicious prosecution. Defendant charged plaintiff with stealing cattle for which he was indicted, tried and acquitted. Some of defendant's cattle, kept on his farm under the charge of one Lambert, were discovered missing the day after plaintiff passed the farm with his droves. Lambert followed the route of the drove and found all but two or three. Lambert was told by one Gage that several of his cattle had been driven away, and that he had pursued and overtaken the drove, had regained his cattle, and the drover had settled with him. Lambert went to defendant with this information, and they pursued and overtook the drove, and found in it two of defendant's yearlings. Defendant charged him with stealing the cattle, and said he had a warrant for him, and would take him back to Rome. Plaintiff said he had rather settle it. The next morning, they settled the matter, and passed receipts. Soon afterwards defendant saw Gage, who told him of plaintiff's having driven off his cattle, and both expressed the opinion that all was not right with the drover. Plaintiff afterwards brought actions against defendant for slander, in charging him with stealing the cattle, and for trover to recover the value of the cattle which defendant had received on the settlement. Defendant then went before the grand jury, and plaintiff was indicted, tried and acquitted. In this action the jury found a verdict for plaintiff for \$250. Defendant moved for a new trial.

BRONSON, Ch. J. There was evidence enough in the case to warrant the jury in finding that the defendant set the prosecution in motion from a bad motive. But all the books agree that proof of express malice is not enough, without showing also the want of probable cause. "Probable cause" has been defined as a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Munns v. Dupont de Nemours*, 3 Wash. C. C. 37. However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. In *Swain v. Stafford*, 25 N. C. 289, and *Id.*, 26 N. C. 392, the action was brought against the defendant, who was a merchant, for charging the plaintiff with stealing a piece of ribbon from his store. At the time the complaint was made the defendant had received such

information as induced a belief of the plaintiff's guilt, and although it afterwards turned out that the property had not been taken by any one, and was never out of the defendant's possession, it was held that an action for malicious prosecution could not be supported. The doctrine that probable cause depends on the knowledge or information which the prosecutor had at the time the charge was made has been carried to a great length. In *Delegal v. Highley*, 3 Bing. N. C. 950, which was an action for maliciously, and without probable cause, procuring a third person to charge the plaintiff with the criminal offense, the defendant pleaded specially, showing that the plaintiff was guilty of the offense which had been laid to his charge; and the plea was held bad in substance, because it did not show that the defendant, at the time the charge was made, had been informed or knew the facts on which the charge rested. The question of probable cause does not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. *Seibert v. Price*, 5 Watts & S. 438.

- Without going into particular examination of the evidence in this case, it is enough to say that the defendant, at the time he went before the grand jury, had strong grounds for believing that the plaintiff had stolen the cattle, and, so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different opinion. Although the plaintiff was in fact innocent, there would be no color for this action, if it were not for the fact that the defendant settled the matter with the plaintiff, instead of proceeding against him for the supposed offense. If the parties intended the settlement should extend so far as to cover up and prevent a criminal prosecution, the defendant was guilty of compounding a felony. And the fact that he made no complaint until the plaintiff commenced the two suits against him goes far to show that he was obnoxious to that charge, and that he was governed more by his own interest than by a proper regard to the cause of public justice. But, however culpable the defendant may have been for neglecting his duty to the public, that cannot be made the foundation of a private action by the plaintiff. Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains; and so long as it exists, it is a complete defense. There is enough in the defendant's conduct to induce a rigid scrutiny of the defense. But if upon such scrutiny it appears that he had reasonable grounds for believing the plaintiff guilty, and there is nothing to show that he did not actually entertain that belief, there is no principle upon which the action can be supported.

On a careful examination of the case, I am of opinion that the verdict was clearly wrong. But, as the charge of the judge is not given, we

must presume that the case was properly submitted to the jury, and a new trial can therefore only be had on payment of costs.

Ordered accordingly.

HADDRICK v. HESLOP.

(12 Queen's Bench Reports, 267.—1848.)

CASE for maliciously and without reasonable and probable cause indicting the plaintiff for perjury. Averment that the plaintiff was tried and acquitted, and judgment given that he should depart without day, as by the record appeared, &c.

Plea, by Heslop: Not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the Durham Summer Assizes, 1847, . . . it was shown, on the part of the plaintiff, that the now defendant Heslop received the account of Haddrick's evidence from another party, and then stated that he would indict Haddrick for perjury; and that his informant thereupon expressed an opinion that there was no ground for such indictment; on which Heslop said that, even if there were not sufficient grounds for the indictment, it would tie up the mouths of Hinde and Haddrick for a time, and that he would move for a new trial. No witnesses were called for the defence. The learned judge asked the jury whether Heslop believed that there was reasonable ground for indicting, and whether he had indicted from malice. The jury answered that Heslop did not so believe; and, as to the malice, they said they thought that the word "malice" was strong but that they thought the defendant had indicted from an improper motive. The learned judge then decided that the indictment was without reasonable or probable cause, and told the jury that they might infer malice from the improper motive. Verdict for the plaintiff.

In Michaelmas term (November 5th), 1847.

Bliss moved for a new trial, on the grounds of misdirection, etc.

LORD DENMAN, Ch. J. It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause. Reference has been made to *Turner v. Ambler*, 10 Q. B. 252, 278, where there was an allusion to a decision of my Brother Maule, upheld afterwards in the Common Pleas, to the effect that reasonable and probable cause cannot exist without belief. There may possibly be some difficulty in distinguishing the case last mentioned from some others: but I think that belief is essential to the existence of reasonable and probable cause: I do not mean

abstract belief, but a belief upon which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense. Proof of the absence of belief is almost always involved in the proof of malice. In *Turner v. Ambler*, there was no point directly made at the trial as to want of belief: the only question was whether the facts of themselves bore out the probability and reasonableness. But, where a plaintiff takes upon himself to prove that, assuming the facts to be as the defendant contends, still the defendant did not believe them, we ought not to entertain any doubt that it is proper to leave the question of belief as a fact to the jury. It is not absolutely necessary that this belief should be the motive on which he acted: he may act from malice, and yet, if there was reasonable and probable cause in which he believed, the case against him must fail. . . .

*Rule refused as to misdirection.*¹

CARL V. AYERS.

(53 New York, 14.—1873.)

ACTION for malicious prosecution in charging plaintiff with stealing or attempting to steal a diamond pin. The evidence on the part of plaintiff was in substance that, being on a steam-boat, on which were defendant, his wife and two children, his attention was attracted by the severe coughing of one of the children, and, intending to tell defendant of a remedy, he went to the place where they were sitting, touched him on the shoulder in order to attract his attention, and said he wished to speak with him. Defendant answered, "If you have anything to say, say it here." Plaintiff was on the point of walking away, but turned and said to the defendant that he merely wished to speak to him with reference to his child's sickness. Defendant answered, "You never mind about my child; you mind your business and I will mind mine." Soon afterward defendant pointed out plaintiff to a detective officer, and charged him with larceny or attempt to steal defendant's diamond pin. Plaintiff was arrested in the presence of the passengers, about half an hour before the boat landed, and was afterwards taken to a station-house by the officer in company with defendant, where he was imprisoned all night, and all of Sunday following until Monday morning, when the justice after hearing the testimony, discharged him.

From the judgment of the general term, affirming judgment entered upon an order of nonsuit, plaintiff appealed.

¹ Opinions by Coleridge, Wightman and Erle, JJ., omitted.

ANDREWS, J. The court was not justified in nonsuiting the plaintiff if there was any evidence of the want of probable cause for causing his arrest and imprisonment, or unless the case, upon the whole proof, was such that a verdict for the plaintiff upon the issue would have been set aside by the court as against evidence. *Masten v. Deyo*, 2 Wend. 424; *Davis v. Hardy*, 6 Barn. & C. 225. If the evidence on the part of the plaintiff would have justified the jury in finding that the defendant acted without probable cause, then, although the proof on the part of the defendant tended to the opposite conclusion, the nonsuit was erroneously granted. There was no independent or conceded fact shown on the part of the defendant which, admitting the case made by the plaintiff, established the existence of probable cause. In considering the propriety of the nonsuit, the plaintiff is entitled to the concession that the facts existed as they appear in the evidence on his part; and upon these facts, aided by any fact favorable to the plaintiff proved by the defendant, the right of the court to nonsuit is to be determined. "Probable cause," which will justify a criminal accusation, is defined to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *Munns v. Dupont de Nemours*, 3 Wash. C. C. 37; *Foshay v. Ferguson*, 2 Denio, 617; *Bacon v. Towne*, 4 Cush. 218.

It does not depend upon the guilt or innocence of the accused, or upon the fact whether a crime has been committed. *Baldwin v. Weed*,¹ 17 Wend. 224; *Bacon v. Towne*, *supra*. A person making a criminal accusation may act upon appearances, and, if the apparent facts are such that a discreet and prudent person would be led to the belief that crime had been committed by the person charged, he will be justified, although it turns out that he was deceived, and that the party accused was innocent. Public policy requires that a person shall be protected who in good faith, and upon reasonable grounds, causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a groundless suspicion, unwarranted by the conduct of the accused, or by facts known to the accuser, when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest. A man has no right to put the criminal law in motion against another, and deprive him of his liberty, upon mere conjecture that he has been guilty of a crime. He cannot be allowed to put a false and unreasonable construction upon the conduct of another, and then justify himself for causing the arrest, by claiming that he acted upon appearances. The application of these familiar principles to the facts in this case leads to a reversal of the judgment. It is not claimed that any larceny was committed, and there was not upon the plaintiff's narration of the circumstances any ground for charging the plaintiff

with an attempt to commit a larceny. The case, as made by the plaintiff, is this: While upon the boat his attention was attracted to the defendant's child by her severe coughing, and he went to the place where the defendant was sitting with his wife and child, to inform him of a remedy, and, not being able to pass in front of the defendant, he went behind him, and touched him once or twice on the shoulder to attract his attention, saying he wished to speak with him. He was roughly answered, and turned to leave, but turned back, and stated to the defendant that he intended to speak with him about his child, and the defendant again replied with great incivility, and soon afterwards caused the plaintiff to be arrested on the charge of an attempt to steal his diamond pin. The defendant wore a valuable pin in his shirt bosom, but it does not appear that the plaintiff saw it, nor had he touched the defendant's person, except when he put his hand upon his shoulder. Upon these facts, there was no reasonable ground to suspect that the plaintiff had a criminal motive. His conduct was neither unusual nor improper. There was no act of the plaintiff which could be construed as an attempt to commit a crime. If the defendant entertained a suspicion that the plaintiff designed to take his pin, it was not justified by the circumstances. The evidence on the part of the defendant materially conflicted with that of the plaintiff, but we can consider only the case made by the plaintiff, and we are of opinion that the evidence on his part disclosed a want of probable cause for the arrest, and that the nonsuit was improperly granted.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PECKHAM, RAPALLO, and FOLGER, JJ., concur. CHURCH, Ch. J., and GROVER and ALLEN, JJ., do not vote.

Judgment reversed.

HARKRADER v. MOORE.

(44 California, 144.—1872.)

THE fourth instruction referred to in the opinion was: "That if the defendant wrongfully, and without reasonable and probable cause, made the charge against the plaintiff, then the charge was malicious without proof that it was dictated by angry feelings or vindictive motives."

By the Court, WALLACE, C. J. This action was brought to recover

damages for an alleged malicious prosecution of the plaintiff by the defendant, who, upon his affidavit made before a Justice of the Peace, charging the plaintiff with having stolen a parcel of fence rails of the alleged value of one hundred dollars, obtained from the Justice a warrant for the arrest of the plaintiff, upon which warrant the latter was arrested and imprisoned, but subsequently, upon being examined before the Justice, it appearing that there was no sufficient cause to believe him guilty, he was discharged from custody and all proceedings against him were dismissed.

The defendant, in his answer, denied that he instituted the proceedings maliciously or without probable cause, and averred that he had reasonable grounds and probable cause to believe, and did believe, that the charge of larceny made against the plaintiff was true, and that the affidavit in that behalf was made in good faith and only for the purpose of promoting the ends of justice and of the public welfare.

Upon trial before a jury the plaintiff obtained a verdict, upon which verdict judgment was rendered, and a motion of defendant for a new trial having been denied, this appeal is brought from the judgment and the order denying a new trial.

1. As to probable cause: It appears by the agreed statement found in the record that the evidence upon the part of the defendant tended to show that the rails, with the stealing of which the plaintiff had been charged, were the property of one Kettenburg and one Salcum, and in charge of the defendant Moore, as their agent, and "that the plaintiff herein took said rails and converted them to his own use without the knowledge or consent of the said Kettenburg or Salcum, or of said Moore; and that after the rails were taken away the plaintiff, Harkrader, denied to defendant that he had taken the rails."

The Court having instructed the jury that if there was probable cause for the prosecution of the plaintiff he could not recover in this action, the defendant, thereupon, requested an instruction that if the jury should find certain enumerated facts, these would, of themselves, amount to probable cause, and would entitle the defendant to a verdict. These facts were, "that the defendant had the possession and the control of the rails as the agent of the owner, and that plaintiff took said rails and converted them to his own use without the knowledge or consent of the owners or of said defendant, and that plaintiff afterwards denied to defendant that he had taken said rails and endeavored to conceal his act of taking said rails." The Court refused to so instruct, and the defendant excepted.

We are of opinion that there was no error in refusing the instruction as requested. The gravamen of the action is that the defendant instituted the proceedings without probable cause—that is, without having at the time such knowledge or information of the circumstances as would

superinduce in the mind of an ingenuous and unprejudiced person of ordinary capacity a reasonable belief that the plaintiff was guilty of the charge. The defense must be that *he did believe and had reasonable grounds to believe at the time* that the accusation he made was well founded. "Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting. It must appear that the defendant knew of the existence of those facts which tended to show reasonable and probable cause, because without knowing them he could not act upon them; and also that he believed the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the opinion that he had a right to prosecute." 2 Greenleaf, Ev., sec. 455.

In *Delegal v. Highley*, 3 Bing. N. C. 959, which was an action for causing a false and malicious charge to be made against the plaintiff before a magistrate without any reasonable or probable cause, the defendant pleaded that he had caused the charge to be made "upon and with reasonable cause," etc., and then set forth the several facts and circumstances in which the charge against the plaintiff originated and upon which the proceedings had been instituted. To this plea a demurrer was interposed, and an objection taken was that it contained no allegation that the defendant at the time he caused the charge to be made had been informed or knew or in any manner acted on those facts and circumstances. "And," (said TINDAL, C. J., in delivering the opinion of the Court) "we are of opinion that the plea is bad not only in form, but in substance, on the ground of objection. The gravamen of the declaration is that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time; and under the plea of not guilty the plaintiff must have failed at the trial if he had not proved that the facts of the case had been communicated to him, or at all events so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man previous to the charge being laid before the magistrate. This was held by the Court of King's Bench in the course of last term, upon a motion for a new trial in the case of *Docorra v. Hillon*. And if the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the Court in a plea of justification, it is obvious that he must allege as a ground of defense that which is so important in proof under the plea of not guilty, viz: that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas, it is quite consistent with the allegations in this plea that the charge was made upon

some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavors to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made.

The instruction as requested, ignoring, as it did, the actual belief of the defendant *at the time he caused the arrest of the plaintiff*, and having no reference to the circumstances, or to the appearances of guilt of the plaintiff, then known to the defendant, and under which he laid the charge against the plaintiff, was properly refused.

2. The Court also refused to instruct the jury that if they believed from the evidence "that at the time of the alleged prosecution, the facts of which the defendant, Moore, then had knowledge, were sufficient to warrant a reasonable man in the belief that the alleged charge was true, the plaintiff cannot recover in this action."

This instruction as requested was obnoxious to the same objection as the last, in that it omitted all reference to the actual state of mind or belief of the defendant at the time; though the facts or circumstances of which he knew or was informed "were sufficient to warrant a reasonable man in the belief that the alleged charge was true," still the defendant may not, in fact, have believed the charge to be true; and if he did not so believe, there could, as to him, be no probable cause for setting the prosecution on foot.

But the proposed instruction is in another respect objectionable. It sought to submit to the jury the question of the existence of probable cause. To inquire whether or not such facts as were known to the defendant were sufficient to warrant him as a reasonable man in the belief that the plaintiff was guilty, is to inquire not only what particular facts were known to him, but also, and at the same time, to determine their legal sufficiency or insufficiency as constituting probable cause. The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and, therefore, one to be determined by the Court. When the facts in reference to the alleged probable cause are admitted, or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted, and the evidence is conflicting, then the determination of their legal effect by the Court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause. But in neither case are the jury to determine whether or not the established facts do or do not amount to probable cause.

3. The Court instructed the jury at the instance of the plaintiff

"that the plaintiff's discharge by the examining magistrate is *prima facie* evidence of the want of probable cause for the charge, and the burden is upon the defendant to prove to the satisfaction of the jury the existence of probable cause." The views already expressed in reference to the preceding point show this instruction to be erroneous. If the Court was of opinion that the discharge of the plaintiff, under the undisputed circumstances appearing, established the want of probable cause, the jury should have been so instructed; if, however there were other and disputed facts, the ascertainment of the truth of which by the jury in the one way or in the other would affect the question of probable cause, the disputed facts should have been called to their attention, and the legal effect of those disputed facts, when found either way as bearing upon the question of probable cause, should have been explained to them.

4. Malice in fact must be shown in order to support the action, and the fourth instruction, as given, would seem to mean that such malice must necessarily be inferred from the want of probable cause. It certainly does not follow that a wrongful accusation made—that is, an accusation made against a really innocent man—and without reasonable or probable cause, is malicious in fact by necessary conclusion; and while the jury *may* find the fact of malice from the circumstances of the want of probable cause, or from other circumstances established in the case, they are not to be told that a wrongful charge made, without probable cause, is *per se* malicious in fact.

*Judgment reversed and cause remanded for a new trial.*¹

¹ "This question [of probable cause] is composed of law and fact; it being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause. . . . Whether the circumstances alleged to show probable cause, or the contrary, are true and existed, is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law.

" . . . If the facts which are adduced as proof of a want of probable cause are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury, with proper instructions as to the law. But where there is no dispute about facts, it is the duty of the court, on the trial, to apply the law to them." *Besson v. Southard*, 10 N. Y. 236, 239.

MALICE.**VANDERBILT v. MATHIS.**

(5 Duer, 304.—1856.)

THIS action was brought to recover damages, on the allegations that the defendant, on Nov. 27, 1854, before a commissioner of the United States falsely, maliciously and without reasonable or probable cause, charged that the plaintiff had committed perjury; that upon such charge the plaintiff was brought before the commissioner, and, after examination, was discharged.

The jury returned a verdict in favor of the plaintiff, and the court ordered that the defendant have twenty days to make and serve a case, with leave to turn the same into a bill of exceptions or special verdict, and that the same be heard, in the first instance, at the General Term.

By the Court, BOSWORTH, J. To maintain an action for malicious prosecution, three facts, . . . , must be established:

1. That the prosecution is at an end, and was determined in favor of the plaintiff.
2. The want of probable cause.
3. Malice.

In such an action, it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that, alone, is not *prima facie* evidence of the want of probable cause. *Gorton v. De Angelis*, 6 Wend. 418.

It is equally essential, that the former prosecution should appear to have been maliciously instituted. Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events, merely because they may find the absence of probable cause.

Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given.

Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice.

The rule is uniformly stated, that, to maintain an action, for a former prosecution, it must be shown to have been without probable cause, and malicious. *Vanduzer v. Linderman*, 10 J. R. 110; *Murray v. Long*, 1 Wend. 140; 2 Stark. Ev. 494; *Willans v. Taylor*, 6 Bing. 173.

The Judge, at the trial, charged, that the fact that the plaintiff was discharged before the magistrate, showed, *prima facie*, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show, affirmatively, that there was probable cause.

He was requested to charge, "that the discharge of Vanderbilt was not *prima facie* evidence of the want of probable cause." This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged, "that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages."

"This question of malice, in fact, supposing that probable cause did not exist, is material only as affecting the question of damages." He was requested to charge "that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the defendant acted from malicious motives." This the Judge declined to do, and to his refusal to so charge the defendant excepted.

Although the evidence which establishes want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference from all the facts and circumstances of the case, upon all the evidence given in the cause, "that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge."

In *Bulkley v. Smith*, 2 Duer, 271, the court stated the rule to be, "that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. Malice is a question of fact, which, when the case turns upon it, must be decided by the jury."

STORY, J., in *Wiggin v. Coffin*, instructed the jury that two things must concur, to entitle a plaintiff to recover in such an action: "The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit."

In *Vanduzer v. Linderman*, 10 J. R. 110, the court said: "No action lies, merely for bringing a suit against a person, without sufficient ground. To maintain a suit for a former prosecution, it must appear to have been without cause, and malicious."

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that, in making the complaint, the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one of which the language of the instruction appears to be susceptible; for the Judge, in charging the jury, stated that the "question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

Malice in fact, is that kind of malice which is to be proved. When malice may be, and is inferred, from the want of probable cause, it is actual malice which is thus proved.

There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice.

The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown, and yet, upon the whole evidence, in any given case, it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such, that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives, and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made, to give the jury a rule of action, in disposing of the case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.

PULLEN V. GLIDDEN.

(66 Maine, 202.—1877.)

THE plaintiff was arrested upon a charge of forgery made by the defendant, and after examination was acquitted and discharged. He thereupon brought this action for malicious prosecution. Verdict for defendant; exceptions by plaintiff.

LIBBEY, J. This is an action for malicious prosecution. The presiding judge instructed the jury that there was not probable cause for the

prosecution. Upon the question of malice he instructed the jury as follows: "In regard to the other branch of the case necessary to be established by the plaintiff, it is that there was malice; that the prosecution was malicious; now what is malice? There are several kinds of malice; but the two kinds of malice that may perhaps be considered in this charge are malice in law and malice in fact. Now what is malice in law? Malice in law is such malice as is inferred from the commission of an act wrongful in itself, without justification or excuse. This is not the kind of malice required in this case. The malice required to be proved in this case is malice in fact. Malice in fact is where the wrongful act was committed with a bad intent from motives of ill-will, resentment, hatred, a desire to injure, or the like. Did such kind of malice exist in the mind of the defendant when he commenced the prosecution in question? Did he do it from bad intent, from evil motives, or did he not? Malice may be inferred from want of probable cause, or it may be inferred and proved by other evidence in the case." Again: "If you should find that there was no malice, such as I have described, the plaintiff could not maintain this action."

The plaintiff complains that this instruction required the jury to find malice in its more restricted, popular sense, when proof of malice in its enlarged, legal sense was all that the law requires.

To maintain his case it was necessary for the plaintiff to prove malice in fact as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts, as in action for libel, where the law presumes malice from proof of the publication of the libelous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove express malice in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill-will, resentment, or hatred towards the plaintiff. It is sufficient if he prove it in its enlarged, legal sense. "In a legal sense any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Commonwealth v. Snelling*, 15 Pick. 337. "The malice necessary to be shown in order to maintain this action, is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation, malicious." *Wills v. Noyes*, 12 Pick. 324. See also, *Page v. Cushing*, 38 Maine, 532; *Humphries v. Parker*, 52 Maine, 502; *Mitchell v. Wall*, 111 Mass. 492.

We think from a fair construction of the instruction upon this point, the jury must have understood that, in order to find for the plaintiff, they must find that the defendant, in prosecuting the plaintiff, was

actuated by express malice, in the popular sense of the term. In this respect it was erroneous.

Exceptions sustained.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

TRUTH A DEFENSE.¹

MACK V. SHARP.

(138 Michigan, 448.—1904.)

MONTGOMERY, J. . . . The court also ruled throughout the case that in this action the defendant was not at liberty to prove that the plaintiff was in fact guilty of the criminal offence imputed to him in the prosecution instituted by the defendant. It is well established by authority that in an action for malicious prosecution it is a complete defence to show that the plaintiff was in fact guilty of the offence charged against him by defendant, and this though the proof of guilt is furnished by evidence not known to defendant when the prosecution against the plaintiff was instituted. This testimony is not in such case offered in support of probable cause, but to show that the plaintiff has suffered no wrong by his arrest. The law considers that, if a criminal is fortunate enough to escape conviction, he should rest content with his good luck, and not belabor one who suspected his guilt and acted accordingly. As was said in *Newton v. Weaver*, 13 R. I. 617:—

“The action for malicious prosecution was designed for the benefit of the innocent, and not of the guilty. It matters not whether there was proper cause for the prosecution, or how malicious may have been the motives of the prosecutor, if the accused is guilty he has no legal cause for complaint.”

See, also, *Threefoot v. Nuckols*, 68 Miss. 123; *Whitehurst v. Ward*, 12 Ala. 264; *Parkhurst v. Masteller*, 57 Ia. 478; *Turner v. Dinnegar*, 20 Hun, 465; *Lancaster v. McKay*, 103 Ky. 616.

* * * * *

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

¹ “It is well settled that in an action for malicious prosecution if the defendant proves the truth of the charges made in the former action, that the defendant in that action was in fact guilty as charged, it constitutes a perfect defense. (*Miller v. Milligan*, 48 Barb. 30; *Hall v. Suydam*, 6 id. 83; *Fagnan v. Knox*, 66 N. Y. 525.)” *Paul v. Fargo*, 84 App. Div. 9, 19.

CIVIL ACTION · WRONGFUL PROSECUTION OF.¹

FERGUSON V. ARNOW.

(142 New York, 580.—1894.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, in an action for malicious prosecution.

EARL, J. A party who brings an action for malicious prosecution against a plaintiff who has been unsuccessful in a civil action, should not be permitted to recover without very clear and satisfactory proof of all the fundamental facts constituting his case. Such actions should not be encouraged.

The costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution. Public policy requires that parties may freely enter the courts to settle their grievances, and that they may do this without imminent exposure to a suit for damages in case of an adverse decision by judge or jury.

Among other things the plaintiff was bound to show in this action a want of probable cause for the action the defendants brought against him, and in this we think he utterly failed, and the trial judge upon the undisputed evidence should have nonsuited him.

¹ "In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule. The case of the malicious institution of proceedings in bankruptcy is undoubtedly one. If these are instituted maliciously and without probable cause, and terminate without an adjudication of bankruptcy, an action will lie for the damages sustained. . . . The case of a civil suit begun maliciously, and without probable cause, by the arrest of the party, is another. So is the case of a suit commenced by an attachment of property. . . . Still another case in which an action will lie for the malicious institution of unfounded proceedings not criminal in their nature, is where they are taken to have the party declared insane, and put under guardianship." Cooley on Torts (2d ed.), 217.

An action for the institution of a civil suit, maliciously and without probable cause, seems to have been maintainable at common law until the enactment of the statute of Marlbridge (52 Hen. III.), which awarded costs to successful defendants *pro falso clamore*. Since that time English courts have not sustained such an action. But in this country, because the recovery of costs is not a recompense for attorney's fees, something which and other incidental expenses a successful party recovers under the English practice, many American courts have allowed the action. It seems to be generally agreed, however, that where a party has been subjected to some special grievance, as by interference with his person or property, in a civil action, maliciously and without probable cause, he may maintain a subsequent action to recover damages. See IX. Harvard Law Rev. 538.

There was a highway in front of the defendants' land which had existed from some time prior to 1804. In 1888 and 1889 it was about four rods wide. The highway commissioner of the town claimed that as originally laid out it was five rods wide, and that it had been encroached upon by the veranda of the defendants' house and by their fences, and he gave them notice of the encroachments, requiring their removal. This they refused and then he caused them to be removed, the plaintiff being one of the principal actors engaged under the commissioner in the removal. The defendants then commenced an action of trespass against the plaintiff and others to recover damages for the removal of the veranda and fences, and in that action they obtained an order for the arrest of the defendants therein, and they were arrested and released upon giving the proper undertaking. The action was put at issue by the answer of the defendants, and it was subsequently brought to trial at a Circuit Court. There evidence was given upon both sides, and the case was submitted to a jury who rendered a verdict for the defendants. Thereafter this plaintiff commenced this action for malicious prosecution of that action, and he recovered a judgment which is brought under review by this appeal.

The three defendants other than Thomas C. Arnow are women, and do not appear to have had anything to do personally with the prosecution of the action against the plaintiff. The defendants had inherited the land from their father, with the veranda and fences there, and they had all known the highway for many years, and had not themselves encroached thereon and did not know of any encroachment thereon by others. The veranda and most if not all of the fences had stood where they were when removed by the plaintiff for at least forty years. The defendants had never heard of any complaint of any encroachment until about 1888. The highway as fenced out was of the usual width, and the claimed width was very unusual. There was no record of the laying out of the highway and no recorded survey thereof. There was a record of the alteration thereof, made in 1804, which simply recited that the highway was five rods wide. But the defendants had never even seen that. They undoubtedly believed that their piazza and fences did not encroach upon the highway, and seemed to have abundant reason for so believing. Under all these circumstances, and others not here alluded to, the defendants commenced the action of trespass, acting under the advice of their counsel. If upon such evidence as we have here an action for malicious prosecution could be maintained, then such an action could be maintained for the unsuccessful prosecution of many of the actions which come upon appeal to this court, and a large proportion of unsuccessful actions could be followed by such an action, and litigation be thus interminably prolonged.

The fact that an order of arrest in the trespass action was obtained

against the plaintiff has no bearing upon the question of probable cause. If the want of probable cause has been established, that fact would have bearing upon the question of malice. For the arrest the plaintiff had his indemnity in the undertaking given upon the granting of the order of arrest.

We regard this as a plain case, and, without a further reference to the law or the facts, our conclusion is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

MALICIOUS USE OF PROCESS.

ZINN v. RICE.

(154 Massachusetts, 1.—1891.)

ACTION for abuse of process. Plaintiff was nonsuited, on the ground that his action was prematurely brought, and accepted.

W. ALLEN, J. It is not contended that the facts alleged in the declaration, and offered to be proved at the trial, are not sufficient to sustain an action by the plaintiff against the defendant. The defendant's contention is that the action is prematurely brought; that it is an action for malicious prosecution, and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for maliciously instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause. The latter, being for the malicious use of legal process by acts authorized by its terms, may be called "actions for malicious prosecution," to distinguish them from actions for the abuse of process by doing under color of legal process acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered him in the first while that issue is pending. The rule is, by its terms and nature, limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution, and in defense to which falsity of the charge cannot be

shown. *Parker v. Langly*, 10 Mod. 209; *Fortman v. Rottier*, 8 Ohio St. 548; *Bumps v. Betts*, 19 Wend. 421; *Barnett v. Reed*, 51 Pa. 190; *Jenings v. Florence*, 2 C. B. (N. S.) 467; *Churchill v. Siggers*, 3 El. & Bl. 929; *Wentworth v. Bullen*, 9 Barn. & C. 849; *Savage v. Brewer*, 16 Pick. 453; *Bicknell v. Dorion*, 16 Pick. 478; *Wood v. Graves*, 144 Mass. 365; *Everett v. Henderson*, 146 Mass. 89.

In the case at bar the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the plaintiff had a good cause of action, and that there is no defense to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and, under color of it, did things not authorized by its terms. His grievance is that the defendant, having a just cause of action, and a legal suit against this plaintiff, made an excessive attachment of property, which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

The defendant contends that the amount of the debt must be fixed by the determination of the former suit, and that it cannot be shown in this suit. We know of no authority or reason for this. The amount of the debt cannot exceed the amount declared for in the suit, and that is admitted to be due, so far certainly as affects this suit. Beyond that there is no question in the former suit, and no issue, and the proceedings complained of were *ex parte*, and they were terminated by the reduction of the attachment. It is argued that the plaintiff in that suit may amend his declaration, and introduce a new cause of action. That case, as stated by the plaintiff himself, does not present any issue involved in the case at bar, and the possibility that a new cause of action may be added, if it existed, would not be sufficient to show that the issues presented in this case are pending in that, or to bring it within the terms or reason of the rule that the liability of this plaintiff to such possible cause of action can be tried only in that action.

*Exceptions sustained.*¹

¹ See *Mayer v. Walter*, 64 Pa. St. 283, 285.

MALICIOUS ABUSE OF PROCESS.

GRAINGER v. HILL.

(4 Bingham, N. C., 212.—1838.)

TINDAL, C. J. This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel which, in September, 1836 he mortgaged to the defendants for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the meantime, the plaintiff should retain command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff, through duress, to give up the register of the vessel, without which he could not go to sea, before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, indorsed to levy £95. 17s. 6d., and kept him imprisoned until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained, by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in trover for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground,—under an application for a nonsuit, and in arrest of judgment.

The first ground urged for a nonsuit is that the facts proved with respect to the writ of *capias* did not amount to an arrest. It appears to me that the arrest was sufficiently established. The facts are that the sheriff's officer comes with a *capias* to the plaintiff, when he is ill in bed, and tells him that, unless he delivers the register or finds bail, he must either take him or leave a man with him. Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shows that the plaintiff was in a situation in which bail was to be procured. That was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's *Nisi Prius*, p. 62, goes the full length: "If the bailiff, who has a process against one, says to him, when he is on horseback or in a coach, 'You are my prisoner; I have a writ against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." But the matter does not rest there; for, upon the suit being arranged, a caption fee, which had been charged by the officer to the plaintiff, was repaid to him by the defendants, who thereby admit the propriety of the charge.

The second ground urged for a nonsuit is that there was no proof of the suit commenced by the defendants having been terminated. But that answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same: that this is an action for abusing the process of the law by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff, at least, is instructed to pursue the exigency of the writ. Here the directions given to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances, and, his complaint being that the process of the law has been abused to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.

As to the count in trover, if the taking of the register was wrongful, that taking was of itself a conversion, and no demand and refusal were necessary as a preliminary to this action. It seems to me that taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking, and therefore this rule must be discharged.¹

[PARK, VAUGHAN, and BOSANQUET, JJ., whose opinions are omitted, concurred.]

MALICIOUS PROSECUTION AND FALSE IMPRISONMENT DISTINGUISHED.

HOBBS v. RAY.

(18 Rhode Island, 84.—1892.)

TRESPASS on the case for false imprisonment.

PER CURIAM. We think the defendant's demurrer to the plaintiff's declaration should be sustained.

The facts set out in the writ and declaration show a case for malicious

¹ See *Wood v. Graves*, 144 Mass. 365; *Dishaw v. Wadleigh*, 15 App. Div. 205; *Foy v. Barry*, 87 App. Div. 291.

prosecution, and not for false imprisonment; and these actions are quite distinct and different from each other. An action of trespass for false imprisonment lies for an arrest, or some other similar act of the defendant, "which," as is said, "upon the stating of it, is manifestly illegal;" while malicious prosecution, on the contrary, lies for a prosecution which, upon the stating of it, is manifestly legal. *Johnstone v. Sutton*, 1 Term R. 510, 544. The declaration in the case at bar shows that the arrest complained of was made under lawful process, although wrongfully obtained. There was, therefore, no false imprisonment, the imprisonment being by lawful authority. *Nebenzahl v. Townsend*, 61 How. Prac. 353, 356. Imprisonment caused by malicious prosecution is not false, unless without legal process or extrajudicial. *Murphy v. Martin*, 58 Wis. 276; *Colter v. Lower*, 35 Ind. 285, 7 Amer. & Eng. Enc. Law, 663, 664, and cases cited. See, also, *Turpen v. Remy*, 3 Blackf. 210; *Mitchell v. State*, 12 Ark. 50, 44 Am. Dec. 253, and cases cited; 1 Chitty, Pl. *133, *167.

The *gravamen* of the offense of false imprisonment is the unlawful detention of another without his consent, and malice is not an essential element thereof; while, in an action for malicious prosecution, the essential elements are malice and want of probable cause in the proceeding complained of.

But while, for the reasons above given, we think the demurrer should be sustained, yet, as the form of action employed by the plaintiff's is case, which is the proper one in actions for malicious prosecution, we see no sufficient reason for sustaining the defendant's plea in abatement to the writ and declaration.

The demurrer is sustained, and the plea in abatement is overruled, with leave to the plaintiff to file a motion to amend his writ and declaration.¹

¹ "False imprisonment is a radically different wrong from malicious prosecution. Recovery of damages in an action for false imprisonment is no bar to an action for malicious prosecution. False imprisonment is a direct injury to the freedom of the person, and, at common law, was an action of trespass. Malicious prosecution may be entirely independent of personal interference, and always gives rise to an action on the case. The very statement of the facts in the case of false imprisonment shows the acts involved to be illegal. The ground of malicious prosecution is the procuring to be done what upon its face is, or may be, a legal act, from malicious motives, and without probable cause. That there should have been an original legal proceeding of some kind, and that the plaintiff should have succeeded in it, is an essential element peculiar to malicious prosecution. The coincidence of malice and want of probable cause is also peculiar to malicious prosecution. Malice is never properly an essential element of false imprisonment; and probable cause, only when there has been an arrest without warrant, and then as matter of the defendant's, and not of the plaintiff's case. Accordingly, advice of an attorney is no defense to false imprisonment; warrant of arrest, in perfect form, is not to malicious prosecution." Jaggard on Torts, 630.

NUISANCE

WHAT CONSTITUTES.

ST. HELEN'S SMELTING CO. v. TIPPING

(11 House of Lords Cases, 642.—1865.)

THIS was an action to recover damages for injuries done to his trees and crops by defendants' works. The defendants are the directors and shareholders of the St. Helen's Copper-Smelting Company (limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor-house and about 1,300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that "the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapors, and other noxious matter to issue from the said works and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed; and also the reversionary lands and premises were depreciated in value." The defendants pleaded not guilty.

The cause was tried before Mr. Justice MELLOR, at Liverpool, in August, 1863, when the plaintiff was examined, and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapor, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross-examination, he said he had seen the defendants' chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was introduced to show that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close by the defendant's works; that the smoke from one was quite as injurious as the smoke from the other; that the smoke of both sometimes united; and that it was impossible to say to which of the two any particular injury was attributable. The

fact that the defendants' works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and, therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in countries where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendant's counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade; whether the place was a suitable place for such a trade; and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative; whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff, and the damages were assessed at £361 18s. 4½d. A motion was made for a new trial on the ground of misdirection, but the rule was refused. (4 Best & S. 608.) Leave was, however, given to appeal, and the case was carried to the Exchequer Chamber, where the judgment was affirmed. (4 Best & S. 616.)

The judges were summoned, and Mr. Baron MARTIN, Mr. Justice WILLES, Mr. Justice BLACKBURN, Mr. Justice KEATING, Mr. Baron PIGOTT, and Mr. Justice SHEE attended. After the argument, the Lord Chancellor (Lord Westbury) proposed these questions: Whether directions given by the learned judge at *nisi prius* to the jury were correct? Whether a new trial ought to be granted in this case? Mr. Baron MARTIN answered that the judges were unanimously of the opinion that the directions were correct, and such as we have given in these cases for the last twenty years.

THE LORD CHANCELLOR. My lords, I think your Lordships will be satisfied with the answer we have received from the learned judges to the questions put by this House.

My lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of present appellants, in their works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set aside that verdict and to direct a new

trial is this, that the whole neighborhood where these copper-smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes of a similar kind, and, therefore, it is said that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgment of the learned judges in the court below), I advise your lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal, with costs.

LORD CRANWORTH. My lords, I entirely concur in opinion with my noble and learned friend on the woolsack, and also in the opinion expressed by the learned judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron MARTIN said, for at least twenty years; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice MELLOR. He says, "It must be plain that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury; because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honor of being one of the barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, "You must look at it, not with a view to the question whether, abstractly, that quantity of

smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;" because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE. My lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included. The defendants say, "If you do not mind, you will stop the progress of works of this description." I agree that it is so; because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights, and allow a person to say, "I will bring an action against you for this and that, and so on." Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected.

My lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench affirmed; and appeal dismissed with costs.

CAMPBELL v. SEAMAN.

(63 New York, 568.—1876.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, entered upon the report of a referee, in an action to recover damages for an alleged nuisance and to restrain its continuance.

EARL, J. The plaintiffs owned about forty acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years 1857, 1858 and 1859 they

built upon it an expensive dwelling-house, and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful.

The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly of plaintiffs' dwelling-house about 1,320 feet, and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found, that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at \$500.

This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiffs' land only when the wind was from the south.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non ledas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice JAMES beautifully said, in *Salvin v. Northbrancepeth Coal Co.*, 9 Law R., Ch. Appeals, 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town which would drive the Dryads and their masters from their ancient solitudes."

But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a

reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick burning was a nuisance to plaintiffs cannot be doubted. Numerous cases might be cited, but it will be sufficient to cite, mainly, those where the precise question was involved in reference to brick burning.

The earliest case is that of the *Duke of Grafton v. Hilliard et al.*, decided in 1736, not reported, but referred to in *Attorney-General v. Cleaver*, 18 Vesey, 211. Chancellor ELDON there says that the court held in that case that "the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance." By looking at that case, as found in a note to *Walter v. Selfe*, 4 Eng. Law and Eq. 18, it will be seen that no such decision was made in that case, and that no such language was used therein. A temporary injunction had been granted in the first instance, restraining brick burning, but it was dissolved upon the defendant's showing that it would really produce no annoyance or injury to the plaintiff. In *Donald v. Humphrey*, 14 F. (Sc.) 1206, the plaintiff brought an action to restrain brick burning, and insisted that the business was *per se* a nuisance and should be restrained without proof of actual injury, but the court held that the business of burning brick was a lawful business and not *per se* a nuisance, but that the question as to whether it was a nuisance or not was one of fact to be determined by the circumstances of each case, and refused an injunction without proof that the business was so conducted as to be a nuisance to the plaintiff.

In the case of *Walter v. Selfe*, *supra*, the defendants were enjoined from burning bricks in the vicinity of the plaintiffs' premises so as to occasion damage or annoyance to the plaintiffs or injury or damage to the buildings thereon standing or shrubberies or plantation named in the bill. In *Pollock v. Lester*, 11 Hare, 266, the defendant was making preparations to burn bricks near a lunatic asylum of which plaintiff was proprietor, and plaintiff brought his bill praying an injunction to restrain the defendant, alleging in his bill that the smoke and vapor arising from the brick burning would be injurious to his patients and cause them to leave his asylum, and would also injure the trees, shrubs and plants thereon growing, and the injunction was granted. This was done, it will be seen, merely upon the apprehension of damage and before any was actually suffered. After the decision of this case, *Hole v. Barlow*, 4 C. B. (N. S.)

336, was decided. That was an action for a nuisance arising from the burning of bricks on defendant's own land near to the plaintiff's dwelling-house, and the judge at the trial told the jury that no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being carried on, and he left two questions to the jury, *first*, "was the place in which the bricks were burned a proper and convenient place for the purpose;" *secondly*, if they thought the place was not a proper place for the purpose then "was the nuisance such as to make the enjoyment of life and property uncomfortable." It was held that there was no misdirection. That case, which was in conflict with prior authorities, has since been overruled in *Beadmore v. Treadwell*, 31 Law Jour. (N. S.) 873; *Bamford v. Turnley*, 31 Law Jour. (N. S., Q. B.) 286; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470; *Bankam v. Hall*, 22 Law Times, (N. S.) 116; *Roberts v. Clark*, 18 id. 49; *Luscombe v. Steer*, 17 id. 229. In *Beadmore v. Treadwell* the court granted an injunction restraining the burning of bricks within 650 yards of the plaintiff's dwelling, holding that the burning of bricks within 350 yards of the plaintiff's residence was a nuisance, although the bricks were to be used in the erection of government fortifications. Vice-Chancellor STUART says: "Upon the facts of the present case, notwithstanding the contradictory evidence, my mind is satisfied that there has been an actual and positive injury to the plaintiff; that the comfort and enjoyment of his mansion house are injured; that the trees planted and standing and growing for ornament have been, in some cases, entirely destroyed, and in many cases injured."

In *Bamford v. Turnley*, COCKBURN, C. J., before whom the case was tried, followed *Hole v. Barlow*, and charged the jury that if they thought the spot was convenient and proper, and that the use by the defendant of his premises was, under the circumstances, a reasonable use of his own land, he would be entitled to a verdict. The jury found for the defendant but upon the hearing in the Exchequer Chamber it was held that the instructions were erroneous, and that it was no answer in an action for a nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property that the injury resulted from a reasonable use of the property, and that the act was done in a convenient place, nor that the same business had been carried on in the same locality for seventeen years. The doctrine of *Hole v. Barlow* was distinctly repudiated, and that case was in terms overruled.

In *Cavey v. Ledbitter*, an action for a nuisance caused by brick burning, the judge at the trial left it to the jury, in substance, to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs and fruit trees had been thereby injured; and he refused to ask them whether the bricks had been burned in a convenient place, and it was held that there was no misdirection.

In *Banham v. Hall*, a bill was filed for an injunction to restrain the defendant from using a brick-kiln in such a way as to be a nuisance to the property of plaintiff, or to plaintiff and his family. There, as here, the damage and annoyance were suffered only when the wind blew from the direction of the kiln, and V. C. Stewart said "that, *prima facie*, a brick-kiln built within 100 yards in front of a mansion-house would be a nuisance, unless the process used for burning the bricks was one of an unusual kind."

Robert v. Clark was a bill for an injunction restraining the defendant from burning brick on his premises to the injury of plaintiff's premises, and the vice-chancellor held that brick burning carried on in the ordinary way was a nuisance to persons living within the limits affected by it, and that 240 yards was no extreme limit for the smoke and vapor to extend, and that it was such a nuisance as the court would restrain.

In *Luscomb v. Steers*, the defendant rented premises and began to burn brick within 1,442 feet of the plaintiff's house on premises adjoining. At the time when the bill was brought no actual injury had been sustained by the plaintiff, but the bill was predicated upon a prospective nuisance. The court denied an injunction upon the grounds that no actual injury having been sustained no nuisance existed; and that no evidence having been given to establish the fact of prospective nuisance, it was not a case for equitable relief. But the court said: "If the business should hereafter become a nuisance to the plaintiff, he can then apply to the court for relief and his rights will be protected."

In this country, so far as I can ascertain, the question of nuisance from brick burning has rarely been before the courts. The only case to which our attention has been called is *Huckeinstine's Appeal*, 70 Penn. 102. In that case AGNEW, J., says: "Brick making is a useful and necessary employment and must be pursued near to towns and cities where bricks are chiefly used. Brick burning, an essential part of the business, is not a nuisance *per se*. *Atty.-Gen. v. Cleaver*, 18 Ves. 219. It, as many useful employments do, may produce some discomfort and even some injury to those near by, but it does not follow that a chancellor would enjoin therefor." He then goes on to say that the aid of an injunction is not matter of right, but of grace, and concludes that there were so many similar nuisances in the locality that it was not clear that this nuisance increased the discomfort from them, and that it was doubtful whether the plaintiff had suffered any material damage from the acts, and therefore held that an injunction ought not to issue and that the plaintiff should be left to his remedy at law. In the following analogous cases useful industries which produced smoke or noxious gases or vapors or odors, were declared nuisances: *Catlin v. Valentine*, 9 Paige, 575; *Peck v. Elder*, 3 Sandf. Sup. Ct. 129; *Taylor v. The People*, 6 Parker Cr. 352; *Davis v. Lamberson*, 56 Barb. 480; *Hutchins v. Smith*, 63 id. 251; *Whitney*

v. *Bartholomew*, 21 Conn. 213; *Cooper v. Randall*, 53 Ill. 524; *Rex v. White*, 1 Burr. 337; *Cook v. Forbes*, L. R. 5 Eq. Cas. 166; *Sampson v. Smith*, 8 Sim. 272; *Tipping v. St. Helen Smelting Co.*, 4 B. & L. 505; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Pointer v. Gill*, 2 Rolls' Ab. 140. Without further citation of authority I think it may safely be said that no definition of nuisance can be found in any text book or reported decision which will not embrace this case.

But the claim is made that although the brick burning in this case is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined.

Prior to Lord ELDON's time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence, which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that this writ is not matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal. *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; *Reid v. Gifford*, Hopkins' Ch. 416; *Pollitt v. Long*, 58 Barb. 20; *Mohawk and Hudson R. R. Co. v. Artcher*, 6 Paige, 83; *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black (U. S.) 545, 551; *Webber v. Gage*, 37 N. H. 182; *Dent v. Auction Mart Association*, 35 L. J. [Ch.] 555; *Attorney-General v. United Kingdom Tel. Co.*, 30 Beav. 287; *Wood v. Sutcliffe*, 2 Sim. [N. S.] 165; *Clowes v. Staffordshire Potteries Co.*, L. R. 8 Ch. App. 125. Here the remedy at law was not adequate. The mischief was substantial and, within the principle laid down in the cases above cited and others to which our attention has been called, irreparable.

The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value

in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. *Cook v. Forbes*, L. R., 5 Eq. Ca., 166; *Broadbent v. Imperial Gas Co.*, 7 De G., McN. & G. 436. These damages are irreparable too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiffs' land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit.

The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained. *Ross v. Butler*, 19 N. J. 294; *Meigs v. Lister*, 23 N. J. Eq. R. 200; *Clowes v. North Staffordshire Potteries Co.*, *supra*; *Mulligan v. Eliot*, 12 Abb. Pr. (N. S.) 259.

It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses. *Taylor v. The People*, *supra*; *Wier's Appeal*, 74 Penn. 230; *Brady v. Weeks*, 3 Barb. 156; *Barnwell v. Brooks*, 1 Law Times [N. S.], 454. One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.

It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. There is no proof that plaintiffs, when they bought their lands, knew that any one intended to burn any bricks upon the land now owned by defendant.

From about 1840 to 1853 no bricks were burned there. Then from 1853 to 1857 bricks were burned there, and then not again until 1867. From 1857 to 1867 the brick-yard was plowed and used for agricultural purposes. Before suit brought, plaintiffs objected to the brick burning. No act or omission of theirs induced the defendant to incur large expenses or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case.

It is true that if a party sleeps on his rights and allows a nuisance to go on without remonstrance or without taking measures either by suit at law or in equity to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief. But this is not such a case. *Radenhurst v. Coate*, 6 Grant's Ch. [Ont.] 140; *Heenan v. Dewar*, 18 id. 438; *Bankart v. Houghton*, 27 Beav. 425.

The defendant claims a prescriptive right to burn bricks upon his land and to cause the poisonous vapors to flow over plaintiffs' lands. Assuming that defendant could acquire by lapse of time and continuous user the prescriptive right which he claims, there has not here been a continuous use and exercise of the right for twenty consecutive years. Anthracite coal was first used for burning bricks in this yard in 1834, and after six years brick burning was discontinued. It was not resumed again until about 1853, and after four years it was again discontinued, and it was not resumed again until 1867. So that anthracite coal, which caused plaintiffs' damage, had not been used in all for twenty years, and certainly not continuously in burning bricks upon the yard now owned by defendant. If he could acquire the right claimed by prescription, he, and those under whom he holds, must for twenty years have caused the poisonous gases to flow over plaintiffs' land whenever they burned bricks and the wind blew from the direction of the kiln. Such a prescription neither the allegations in the answer nor the proofs upon the trial, nor the findings of the referee, warrant. The referee finds that the premises of defendant have been known and used as a brick-yard for over twenty-five years. This is not a finding that they have been used as a brick-yard for twenty-five years continuously, or that they have caused the poisonous gases to flow over plaintiffs' land for that length of time continuously. *Ball v. Ray*, L. R. 8 Ch. App. 467; *Parker v. Mitchell*, 11 Ad. & El. 788; *Battishill v. Reed*, 18 C. B. 696; *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee,

is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction. He does not own the only piece of ground where bricks can be made. We know that material for brick making exist in all parts of our State, and particularly at various points along the Hudson river. An injunction need not therefore destroy defendant's business or interfere materially with the useful and necessary trade of brick making. It does not appear how valuable defendant's land is for a brickyard, nor how expensive are his erections for brick making. I think we may infer that they are not expensive. For aught that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiff's damages from its continuance. Hence this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.

We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brick making. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly settled community.

Defendant complains that the damage allowed by the referee was too great. He had the evidence and all the circumstances before him, and we cannot review his decision upon the amount of damage.

It is also complained that the injunction contained in the judgment as entered is broader and more unlimited than that ordered by the referee. This is a matter not to be corrected upon appeal. Defendant should have compelled an entry of judgment in accordance with the decision of the referee. If plaintiffs entered a judgment not authorized by the referee's report, defendant should have moved to set it aside or to correct it.

One of the three judges who heard the appeal in the General Term of the Supreme Court died before the decision was made, and the appeal was decided by the remaining two judges, and this appeal is from the judgment entered upon that decision. It is now objected that the two judges could not make a decision. Even if the defendant, after he has appealed from the judgment, can raise the objection, we are of opinion that the objection is not well founded, and that two judges can hold a General Term and decide cases argued there. *Van Rensselaer v. Whitbeck*, 2 Lans. 499.

It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed.

ROGERS v. ELLIOTT.

(146 Massachusetts, 349.—1888.)

ACTION to recover damages, resulting from the continued ringing of the bell on a church by orders of the defendant, the plaintiff suffering great pain therefrom. It appeared at the trial, that plaintiff was suffering from sunstroke, and that the ringing of the bell threw him into convulsions. Defendant refused to refrain, when requested, from ringing the bell. Verdict directed for defendant. Plaintiff excepted.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street, in a thickly-settled part of the town; and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. *Wesson v. Iron Co.*, 13 Allen, 95.

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured? In densely populated communities, the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances? If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one

hand, who are peculiarly susceptible to it, or those on the other, who, by long experience, have learned to endure it without inconvenience; nor upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly, if not quite, as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house—not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow. *Fay v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 133 Mass. 289; *Walter v. Selfe*, 4 De Gex & S. 323; *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

In *Walter v. Selfe*, Vice-Chancellor KNIGHT BRUCE, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age or state of health."

It is said by Lord ROMILLY, master of the rolls, in *Crump v. Lambert*, L. R. 3 Eq. 408, that "the real question in all the cases is the question of fact, viz., whether the nuisance is such as materially to interfere with the ordinary comfort of human existence."

In the opinion in *Sparhawk v. Railway Co.*, 54 Pa. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injuries from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence."

In the case of *Westcott v. Middleton*, 43 N. J. Eq. 478, (decided December 9, 1887,) it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible, and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor BIRD, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, how

many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining? . . . A wide range has indeed been given to courts of equity, in dealing with these matters, but I can find no case where the court has extended aid, unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike."

If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate, or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff, in his brief, concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far, and under what circumstances, malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.

COMMONWEALTH v. MORRISON.

(197 Massachusetts, 190.—1908.)

PROCEEDINGS by the commonwealth against Hugh J. Morrison for unlawfully obstructing Adams Square, in the city of Boston, by unlawfully maintaining therein a vehicle called a "lunch cart." A verdict was rendered finding defendant guilty, and the case was reported to the Supreme Judicial Court.

RUGG, J. The defendant is complained of for obstructing a highway in the city of Boston. The facts are that the defendant kept a lunch wagon upon a public way, known as Adams Square, in the night time. This wagon was of the kind commonly used, and was a rectangular box-like structure, placed upon the four-wheel running gear of an ordinary wagon, and was drawn to Adams Square by a single horse harnessed into the wagon shafts in the usual way. The upper structure of the wagon had a door, or entrance, about midway on one side. There were six windows on one side and five on the other, and three on each end. The inside of the wagon was fitted up with a counter at one end, behind which was a stove and an urn for making coffee, and in front of which were six stools, on which people sat while eating. The rest of the interior was left empty for standing room. Every night, Sundays excepted, in the month of December, 1905, at about 6:30 o'clock, the wagon was placed in the same spot in Adams Square, and the horse was taken out and led away. About 5 o'clock each morning the horse was brought back, harnessed to the wagon and driven off. During the night the wagon remained in the same place, and was resorted to by people for food. The defendant served various kinds of food to people, who entered and ate in the wagon, and to others in the street, who were waited on through the openings in the side.

The defendant attempted to justify his acts by a permit issued to him in 1894 by the board of aldermen of the city of Boston, to stand a wagon in Adams Square between the hours of 6 p. m. and 5 a. m., and under licenses as a hawker and peddler from the street department and the board of health of the city of Boston. We assume that the licenses or permits issued to the defendant as hawker and peddler by the health department and the street department were properly issued pursuant to a legal ordinance covering the subject, and that notwithstanding considerations hereinafter discussed, it is within the jurisdiction of the city council of the city of Boston to enact limiting ordinances respecting hawkers and peddlers. *Com. v. Ellis*, 158 Mass. 555; *Com. v. Reid*, 175 Mass. 325. Standing alone, the licenses or permits as hawker and

peddler gave the defendant no authority to set up a lunch wagon within the limits of the highway for hours at a time, nor to commit any obstruction in the public street. The character of business conducted by the defendant, which was always at a fixed place and from a room, which, although set upon wheels, had characteristics of a shop or eating house, does not come within the description of business done by hawkers and peddlers, who as a matter of common understanding, as well as statutory definition (Rev. Laws, c. 65, § 13) are persons who travel about, either on foot or in wagons, carrying and exposing for sale goods, and generally, though not necessarily, by outcry, sign or advertisement, attracting attention to their wares. *Com. v. Ober*, 12 Cush. 493; *Com. v. Hana*, 194 Mass. 000. The licenses as hawker and peddler are no greater protection to the kind of business, which the defendant carried on, than they would be to a common victualer. A short answer to the defendant's further contention, that he is protected by the permit from the board of aldermen, is that the board of aldermen had no jurisdiction to grant the permit upon which he relies, even if we assume that the defendant's place of business can be properly comprehended within the generic phrase, "carriage, vehicle, wagon, cart or coach." The first statutory provision respecting this subject appears to be in section 7, c. 31, p. 372, St. 1799, although there were earlier acts respecting hackney carriages. St. 1795, p. 412, c. 51; St. 1796, p. 62, c. 32. This statute imposed a fine for permitting "any cart, wagon, stage or hack coach, stage wagon or other carriages, new or old, finished or unfinished," to remain more than one hour in any street, lane or alley in Boston without permission of the surveyors of highways, with a provision, manifestly intended for the protection of country folk, that no prosecution should be commenced "against any driver of any cart or wagon coming from the country" unless specially directed. This section was repealed by section 3, c. 224, p. 448, St. 1847, other sections of which conferred upon the mayor and aldermen of cities general power for the regulation of all sorts of carriages and vehicles. Chapter 244, p. 199, St. 1878, authorized the appointment of a board of police commissioners by the mayor for the city of Boston, and empowered the city council to confer upon such board all the powers possessed by the board of aldermen "in relation to licensing, regulating and restraining, . . . hawkers and peddlers, carriages, wagons and other vehicles." Acting apparently upon the authority conferred by this section, section 3, c. 24, of the Revised Ordinances of the city of Boston of 1883, being the eighth revision, provided that the board of police commissioners "shall have and exercise all the powers conferred by the statutes of the commonwealth and the ordinances of the city upon the board of aldermen or upon the mayor and aldermen, in relation to licensing, regulating, and restraining . . . hawkers and peddlers, carriages, wagons and other

vehicles." So far as this subject is concerned, substantially the same provision is contained in section 1, c. 26, of the Revised Ordinances of 1895, being the ninth revision. By chapter 323, p. 777, St. 1885, a board of police was created for the city of Boston to be appointed by the Governor of the commonwealth. Section 2 of this act conferred upon the board of police "all the powers now vested in the board of police commissioners in said city of Boston by the statutes of the commonwealth or by the ordinances, by-laws, rules and regulations of said city," with exceptions not here material. See St. 1906, pp. 254, 256, c. 291, §§ 4, 10. These provisions of the statutes and ordinances were in force during the period covered by the complaint. It is clear that, if the defendant was either a hawker or a peddler or operating a carriage, wagon or other vehicle, he could justify his actions only by showing a license from the board of police of Boston. This he did not have and his justification fails.

But the ruling of the court below was correct upon broader grounds. The device, which the defendant maintained, although mounted upon wheels, was in fact a small room used for an eating house, and kept constantly at one place in the street, for over ten consecutive hours. During this time no horse was attached, and no use was at any time made of the wheels except to drag the cart to and from its place in the public way. The public acquire by the location of a highway an easement of passage, with all the powers and privileges, which are necessarily implied as incidental to the exercise of this right. The easement is coextensive with the limits of the highway. The fee of the land remains in the landowner, who may make any use of it not inconsistent with the paramount right acquired by the public. *Como v. Worcester*, 177 Mass. 543. The easement which the public acquires includes every reasonable means of transportation for persons, and commodities, and of transmission of intelligence which the advance of civilization may render suitable for a highway. Under this description of the character of rights acquired by the public, gas and water pipes, sewers, telephone, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway and private railroads have been permitted. *Pierce v. Drew*, 136 Mass. 75; *Howe v. West End St. Ry.*, 167 Mass. 46; *Allen v. Boston*, 159 Mass. 324; *White v. Blanchard Bros. Granite Co.*, 178 Mass. 363; *N. E. Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397; *Boston Elec. Light Co. v. Boston Terminal Co.*, 184 Mass. 566; *Lorain Steel Co. v. Norfolk & Bristol St. Ry. Co.*, 187 Mass. 500; *Eustis v. Milton Street Ry. Co.*, 183 Mass. 586; *McDermott v. Warren, Brookfield & Spencer St. Ry. Co.*, 172 Mass. 196; *Sears v. Crocker*, 184 Mass. 586; *Natick Gaslight Co. v. Natick*, 175 Mass. 246; *Hyde v. Boston & Worcester St. Ry. Co.*, 194 Mass. 80. But, notwithstanding these various instrumentalities, they are all manifestations in divers forms of the right of travel of persons, the

transmission of intelligence and the transportation of commodities. The primary purpose of a highway is the passing and repassing of the public, which is entitled so far as needed to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose. Whenever the public does not have occasion to exercise its easement to its full extent, the owner of the fee may make any use not inconsistent with the easement of the public. Whatever interferes with the exercise of this easement is a nuisance. *Com. v. King*, 13 Metc. 115, 118; *Com. v. Wilkinson*, 16 Pick. 175; *Gifford v. Westport*, 190 Mass. 323; *Tinker v. N. Y., O. & W. R. R. Co.*, 157 N. Y. 317. The stands of hackney carriages may perhaps be justified as a phase of public travel. (*Com. v. Matthews*, 122 Mass. 60), and the use of streets in connection with markets, in view of long-continued customs in Boston and perhaps elsewhere in this commonwealth, as incidental to the transportation of merchandise (*Com. v. Brooks*, 109 Mass. 355), and possibly also in connection with the establishment of a public market (*Spaulding v. Lowell*, 23 Pick. 71; *Kinney v. Robison*, 49 Mich. 249.) Whether carriage and truck wagon stands can be authorized against the protest of an abutting owner may be open to doubt. See *Branahan v. Hotel Co.*, 39 Ohio St. 333; *Lippincott v. Lasher*, 44 N. J. Eq. 120; *McCaffrey v. Smith*, 41 Hun (N. Y.), 117. Hawking and peddling is also an illustration of a legitimate use of the highway. It consists of transportation of merchandise, and the stops for sale are brief and ordinarily not of such character as to constitute any substantial obstruction to the rights of travelers. The business of the defendant does not come within any description of travel, nor does it have a necessary or reasonably natural connection with the passing of persons or the transportation of commodities. The establishment in highways of drinking fountains (Rev. Laws c. 25, § 15; *Cushing v. Bedford*, 125 Mass. 526), erection of guide boards (Rev. Laws, c. 52, §§ 1, 2, 3; St. 1906, p. 194, c. 234; *Sharon v. Smith*, 180 Mass. 539), and planting and protection of shade trees (Rev. Laws, c. 25, § 15; *Washburn v. Easton*, 172 Mass. 525; *Hall v. Wakefield*, 184 Mass. 147), have all been expressly authorized by statute, and bear an obvious relation to the convenience, comfort and pleasure of travel. The obstruction they offer to the use of the entire way for passage is ordinarily trifling, and they have been regarded as legally incidental to the general purpose for which the public easement of travel has been taken from the private owner by eminent domain. But eating, although necessary for human beings, is no more essential to their welfare than sleeping or clothing or cleanliness, nor does it bear any closer relation to travel upon highways than any of these other human functions. But it could not be contended that the establishment on wheels of lodging houses, provision or furnishing stores, or bathrooms, to be drawn and left for considerable periods of time at fixed places in the highway, was fairly comprehended within the

description of travel upon the highway. *Haberlil v. Boston*, 190 Mass. 358. It may well be that the present instrumentalities or methods of travel do not necessarily exhaust the range of use to which highways may be put, but the acts of the defendant do not belong to the class of purposes for which ways have been established. Moreover, the defendant is appropriating, for purely personal profit, a substantial portion of what has been procured from private owners at the public expense for a wholly public use. He is plying his vocation at a particular place within the limits of the highway for several hours at a time, night after night. In a limited way he is doing the same sort of service as innkeepers and common victualers. Therefore, no municipal ordinance can afford him a shield of protection against prosecution for an obstruction to travel upon a public way. *Cohen v. Mayor*, 113 N. Y. 532; *Com. v. Milliman*, 13 S. & R. (Pa.) 403; *Blodgett v. Boston*, 8 Allen, 237; *Com. v. Wentworth*, 4 Clark (Pa.) 324. See *Keith v. Easton*, 2 Allen, 552.

Verdict to stand.

CLIFFORD v. DAM.

(81 New York, 52.—1880.)

APPEAL from judgment of the General Term of the Superior Court, city of New York, affirming judgment on jury trial.

This is an action brought to recover damages for an injury to the plaintiff, caused by falling through a coal-hole in the sidewalk in front of defendant's hotel in the city of New York. The hole was covered with an iron disc which fitted into a groove. When plaintiff stepped upon it, it flew off, and plaintiff was precipitated into the vault.

Upon the trial the defendant offered to show that the vaults underneath the sidewalk, and the coal-hole, were built by license of the city authorities. The court held that the evidence was not admissible under a general denial, to which defendants excepted.

CHURCH, Ch. J. The only questions which seem to have been raised by proper exceptions on the trial relate to the rejection of evidence of a permit to make the excavation and construct the coal-hole. The defendants' counsel asked a witness whether he recollected obtaining any privilege to put vaults under the sidewalk adjoining the hotel. This was objected to on the ground that no license had been pleaded, and because immaterial and irrelevant. It was then offered to show that the usual permit had been obtained from the proper authorities in the city of New York authorizing the construction of the vaults under the sidewalk with the openings therein. The witness stated that the permit was in

writing, and it was further objected that it should be produced. The court then said: "I exclude the proposed evidence." The evidence might have been excluded upon the ground that the best evidence should be produced, but taking what occurred, especially in connection with the charge(which was not properly excepted to), it is fair, I think, to assume that the court intended to reject the evidence as incompetent, because not pleaded, or as immaterial. We are of opinion that it should have been pleaded, and concur with the General Term. The public are entitled to an unobstructed passage upon the streets, including the sidewalks of the city, but a structure such as that proved in this case was an obstruction. It was sufficient for the plaintiff to prove that, in passing along the sidewalk, he was injured by this structure, which was appurtenant to defendants' premises. It was not necessary to prove negligence. The action was not based upon negligence, but on a wrongful act, for which the defendants were responsible. If a permit was material, the effect of it would only be to mitigate the act from an absolute nuisance, to an act involving care in the construction and maintenance; and to justify such a structure, it would be necessary not only to plead it, but also to allege and prove a compliance with its terms, and that the structure was properly made and maintained, to secure the same safety to the public, that the sidewalk would have secured without it. When permission is given, by a municipal authority, to interfere with a street solely for private use and convenience, in no way connected with the public use, the person obtaining such permission must see to it, that the street is restored to its original safety and usefulness. Whatever the plaintiff is required to prove to establish his cause of action, the defendant may disprove under a general denial. This is the general rule. Applying that rule it is quite clear that the plaintiff was not bound to prove, in the first instance, anything except the existence of a hole in the sidewalk for which the defendants were responsible, and that in passing along the sidewalk he fell into it. It was not even necessary, in the first instance, that he should prove a want of contributory negligence, for the reason that the action is not founded upon negligence, but upon a wrongful act. If there was any justification for the act, it was incumbent upon the defendants to allege and prove it. If the plaintiff caused the injury himself, as if he voluntarily jumped into the hole, he could not recover; but he was bound to no special care to avoid such an accident. The public have a right to assume that these structures are as safe as any other portion of the sidewalk.

The case proved was amply sufficient to warrant the verdict, which was not excessive, and no legal error was committed, justifying a reversal of the judgment, and it should be affirmed.

All concur, except MILLER, J., absent; FOLGER and EARL, JJ., concurring in result.

Judgment affirmed.

BOHAN V. PORT JERVIS GAS LIGHT CO.

(122 New York, 18.—1890.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, in an action to recover damages for the depreciation in the value of plaintiff's property, alleged to have been caused by the manufacture of gas in close proximity thereto by the defendant, and to restrain a continuation of the nuisance.

The complaint, among other things, alleged: "That about the year 1880, the defendant erected a new tank for the purpose of its gas-works on its said premises, the southern side of which stands within a few feet of plaintiff's premises. That about the year 1880, the defendant began, and ever since has and still does manufacture its gas at said works from naphtha, and that said tank was and still is used to store said naphtha for the purposes aforesaid. That naphtha is an offensive, noxious, unhealthy and sickening mineral substance, destructive to the health and comfort of those required to be and remain in close proximity to it. That said tank was erected and is maintained in a negligent and unskillful manner and by reason of the negligence and want of care upon the part of the defendant in the construction, use of and maintenance of said tank . . . and also by reason of the erection and use of said tank and said works and the negligent and unskillful manufacture of gas from naphtha, the defendant has since 1880, and still does maintain a nuisance injurious to the comfort and enjoyment of the plaintiff, and injurious to the rental value of the said premises." The answer admitted the erection of the tank and the use of naphtha in the manufacture of gas, but denied negligence in the erection of its works or in the conduct of its business.

BROWN, J. The plaintiff made no complaint of the existence of a nuisance upon defendant's property prior to 1880, when defendant first introduced the use of naphtha in the manufacture of its gas, and it was a disputed question on the trial, upon which there was a strong conflict of testimony, whether the smells from the defendant's works, after it began to use naphtha, were more offensive than when it used coal.

This question, it must be assumed, the jury determined in favor of the plaintiff's contention.

The court charged the jury that, to constitute a nuisance, it was essential that the smells and odors from the defendant's works should be sufficient "to contaminate and pollute the air and substantially interfere with the plaintiff's enjoyment of her property," and that the question for them to determine was: "Did the odor pollute the air so as to

substantially render plaintiff's property unfit for comfortable enjoyment." An exception was taken by the defendant to this part of the charge.

The rule stated by the learned judge was in accordance with all the authorities. If one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages, and it is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable. *Rex v. White*, 1 Burr. 337; *S. H. S. Co. v. Tipping*, 11 H. L. Cas. 642; *Fish v. Dodge*, 4 Denio, 311; *Cotlin v. Valentine*, 9 Paige, 575; *Campbell v. Seaman*, 63 N. Y. 568; *Cogswell v. N. Y., N. H. & H. R. Co.*, 103 id. 10; *Wood on Nuis.*, § 497.

It was claimed by the defendant, and the court refused a request to charge, "that unless the jury should find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at these works were unskillful and incapable, their verdict should be for the defendant;" and "that if the odors which affect the plaintiff are those that are inseparable from the manufacture of gas with the most approved apparatus and with the utmost skill and care, and do not result from any defects in the works, or from want of care in their management, the defendant is not liable." An exception to this ruling raises the principal question discussed in the case.

While every person has exclusive dominion over his own property and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights.

The maxim, "*Sic utere tuo ut alienum non laedas*" limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood.

The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced, holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion.

In *Campbell v. Seaman*, *supra*, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery.

In *Heeg v. Licht*, 80 N. Y. 579, an action for injuries arising from the explosion of fire-works, the trial court charged the jury that they must find for the defendant, "unless they found that the defendant carelessly

and negligently kept the gunpowder on his premises." And he refused to charge upon the plaintiff's request "that the powder-magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not." There was a verdict for the defendant, and this court reversed the judgment, holding that the charge was erroneous. In *Cogswell v. N. Y., N. H. & H. R. Co.*, *supra*, the Special Term found, as facts, that in the construction of the engine-house and coal-bins, and in the use of its premises the defendant exercised due care, so far as the same was practicable, and it refused to find, upon plaintiff's request "that in the construction of the engine-house, chimney, smoke-pipe, and coal-bins, it had not exercised, and does not now exercise, such reasonable and proper care as was necessary not to injure the plaintiff's property." A judgment for the defendant was reversed, this court holding that the engine-house as used was a nuisance, and that it was not an answer to the action that the defendant exercised all practicable care in its management. In *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257, the charge of the court, and the refusals to charge, were very similar to the charge in this case. The Supreme Court of Pennsylvania overruled the exceptions, holding that negligence was not essential to a right of recovery. To the same effect see *Cleveland v. C. G. L. Co.*, 20 N. J. Eq. 201; *O. G. L. &c. Co. v. Thompson*, 39 Ill. 598; Wood on Nuis. (2d ed.), § 553.

The principle, that one cannot recover for injuries sustained from lawful acts done on one's own property without negligence and without malice, is well founded in the law. Every one has the right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him.

The wants of mankind demand that property be put to many and various uses and employments, and one may have, upon his property, any kind of lawful business, and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. Such losses the law regards as *damnum absque injuria*.

And under this principle, if the steam-boiler on the defendant's property, or the gas-retort, or the naphtha tanks has exploded and injured the plaintiff's property, it would have been necessary for her to prove negligence, on the defendant's part, to entitle her to recover. *Losee v. Buchanan*, 51 N. Y. 476.

But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application and the law of nuisance applies. *Hay v. Cohoes Co.*, 2 N. Y. 159; *McKeon v. See*, 51 N. Y. 300.

The exception to the refusal to charge the first proposition above quoted was not, therefore, well taken.

It is contended, however, by the defendant, that the acts of the legislature relating to gas companies are a protection from liability for consequential injuries flowing from the manufacture of gas, or the prosecution of the business, when want of care forms no element of the cause of injury, and it is sought to apply to this case the broad principle that that which the law authorizes cannot be a nuisance, although it may occasion damages to individual rights and property.

The cases cited to sustain this proposition are ones where municipal corporations were engaged in grading and improving public streets and highways. *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Transportation Co. v. Chicago*, 99 U. S. 635. Or where the act causing the injury was done by corporations in the construction of works upon property acquired under the power of eminent domain. *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42.

In these cases, in doing the acts complained of, the defendants acted in the performance of a public duty imposed upon them by the legislature, or in the exercise of a right conferred by law; and it is well settled that persons appointed or authorized by law to perform a public duty, or to do acts of a public character are not answerable for consequential damages if they act within their jurisdiction and with care and skill. *Trans. Co. v. Chicago, supra*, 641; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Conklin v. N. Y., O. & W. R. Co.*, 102 id. 107; *Cooley on Const. Lim.* (5th Ed.), 671.

This principle cannot, however, be applied to cases like the one under consideration.

The defendant is incorporated under chapter 37, Laws of 1848, which authorizes in general terms the creation of corporations for manufacturing and supplying illuminating gas. It acquired by that act its corporate life and character, and the power to purchase and hold such real and personal property as might be necessary to enable it to carry on its business.

By section 18 of the act named, it is given the power to lay its conductors through the streets of the city, village or town in which it is located, with the consent of the municipal authorities of such city, etc., and by chapter 311 of the Laws of 1859, it is required to furnish gas to any applicant within 100 feet of its mains.

It may be conceded that the business of manufacturing and distributing gas through the public streets for public and private use is a business of a public character, and the individual possessing such right has a franchise granted by the state for a public object, and that it meets a public necessity for which the state may make provision.

But the state has not seen fit to confer upon the corporations formed

under the act cited, the power of eminent domain, and they cannot, therefore, locate their works where they will.

In their ability to acquire real estate upon which to establish their manufactory, they have no greater power than any citizen of the state, and having acquired property they rest under the same obligation as other citizens, to make a reasonable use of it and to respect and regard the rights of their neighbors.

The proposition contended for by the learned counsel for the defendant has, in recent years, received full consideration in the courts of England and of this country, and the rule is now established that the statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury. *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10; *B. & P. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317; *Hill v. Managers of Met. Asylum Dist.*, L. R. (4 Q. B.) 433; L. R. 6 App. Cas. 193; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Eames v. N. E. W. Co.*, 11 Metc. 570; *Commonwealth v. Midder*, 107 Mass. 188.

In *Pottstown Gas Co. v. Murphy*, the Supreme Court of Pennsylvania said: "The principle invoked applies only when an incorporation clothed with a portion of the state's right of eminent domain takes private property for public use on making proper compensation, and when such damages are not a part of the compensation required."

In *Eames v. N. E. Worsted Co.*, Chief Justice SHAW said: "The Mill Act affords no warrant or justification for erecting or maintaining a nuisance."

In *Commonwealth v. Kidder*, in considering the effect of a statute authorizing the storing and manufacturing of naphtha and petroleum, the Supreme Court of Massachusetts said: "The reasonable, if not necessary, inference is that it was not the intention of the legislature to establish a new rule in this regard, but to leave the question whether the manufacturing is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law."

In *B. & P. R. Co. v. Fifth Bap. Ch.*, it was said: "The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them where it may think proper without reference to the property and rights of others. Grants of privileges or power to corporate bodies like those in question confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

And in *Hill v. Managers of Met. Asylum Dist.*, Lord WATSON said:

"Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected."

There is nothing in *Truman v. L. B. & S. C. R. Co.*, L. R. (25 Ch. Div.) 45, conflicting with this rule.

The House of Lords in that case recognized fully the rule applied in *Hill v. Managers of Met. Asylum Dist.*, and held that the purpose for which the land was acquired by the defendants being expressly authorized by the act of parliament, and being incidental and necessary to the authorized use of the railway for cattle traffic, the company were authorized to do what they did.

The legislature may authorize acts which would otherwise be a nuisance when they affect or relate to matters in which the public have an interest, or over which the public have control, such as highways or public streams.

In such cases the legislative authorization exempts from liability to suits civil or criminal at the instance of the state, but it does not affect the claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large. *Crittenden v. Wilson*, 5 Cow. 165; *Brown v. C. & S. R. R. Co.*, 12 N. Y. 486; *Sinnickson v. Johnson*, 17 N. J. L. 151; *B. & P. R. Co. v. Bap. Church*, *supra*.

These views lead to the conclusion that the defendant obtained no immunity from liability for consequential injuries sustained by property surrounding its works by reason of its incorporation, or the privilege conferred upon the business by the acts of the legislature, and that the facts of the case do not take it out of the operation of the rules of law applicable to ordinary common-law nuisances.

The legislature has given to the corporations created to manufacture gas the right to lay down their conductors in the public streets subject to the control and regulation of the municipal authorities, and for acts done in the execution of that privilege they are exempt from prosecution at the suit of the people.

The choice, however, of the place to locate their works, and the selection of materials from which to manufacture gas, has been left to the corporations, and those things must be performed with reference to the rights of others.

The fact appears in this case that for twenty years the defendant conducted its business without annoyance to any one. For the sake of economy (so it alleges) it adopted, in 1880, a new process and new materials from which to make its gas. The result, under the finding of the

jury, has been to impair the value of the plaintiff's property and substantially interfere with its comfortable enjoyment. If the defendant's contention should prevail, there would be no restraint upon the location of the business, and no limit to the offensive character of the materials it might use. It would thus have an immunity which the law denies to every other citizen.

We think the proof permitted the conclusion that the defendant had created a nuisance, and that there was no error in the charge of the court, or the refusal to charge.

The judgment must be affirmed.

*Judgment affirmed.*¹

PUBLIC NUISANCE AND SPECIAL DAMAGE.

WESSON v. WASHBURN IRON CO.

(13 Allen, 95.—1866.)

ACTION for injuries to premises, caused by the operation of defendant's rolling-mill and foundry. It was admitted at the trial that defendant's works were erected in a proper locality, were properly constructed and managed, but, it was contended, that the jarring and noise from the machinery, and the smoke, cinders and dust from its operation, materially injured plaintiff's premises.

Plaintiff requested the court to instruct the jury that if her dwelling-house was injured by jarring and shaking, and rendered unfit for habitation by smoke, cinders, dust, and gas from the defendant's works, it was no defense to the action that many other houses in the neighborhood were affected in a similar way. But the judge declined so to rule, and instructed the jury, in accordance with defendant's request, that plaintiff could not maintain this action if it appeared that the damage which plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood. Verdict for defendant. Plaintiff excepted.

BIGELOW, C. J. . . . The more interesting question remains to be considered whether the instructions under which the case was submitted to the jury were correct and appropriate to the facts in proof.

There can be no doubt of the truth of the general principle stated by

¹ Dissenting opinion by Haight, J., omitted.

the court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage in his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. Several instances of the application of this rule are to be found in our own Reports. *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, 19 Pick. 511, 514; *Quincy Canal v. Newcomb*, 7 Metc. (Mass.) 276, 283; *Holman v. Townsend*, 13 Metc. (Mass.) 297, 299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Railroad Co.*, Id. 506, 511; *Blood v. Railroad Corp.*, 2 Gray, 140; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn v. South Reading*, Id. 501; *Fall River Iron-Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 224.

But it will be found that in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience, and injury to persons and property thereby occasioned. Where a public right or privilege, common to every person in the community, is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no

actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree, but in kind, from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that, in effect, a wrong-doer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: that, when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case, the act, of itself, does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor

of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This, we think, is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly, multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right.

The rule of law is well settled and familiar, that every man is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it, and that the carrying on of an offensive trade or business, which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged or whose health is injured, or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed, thereby may well maintain an action to recover compensation for the injury. The limitations proper to be made in the application of this rule are accurately stated in *Bamford v. Turnley*, 3 Best & S. 66, and in *Tipping v. Smelting Co.*, 4 Best & S. 608-615, 11 H. L. Cas. 642, and cases there cited. See, also, in addition to cases cited by the counsel for the plaintiff, *Spencer v. Railway Co.*, 8 Sim. 193; *Soltau v. De Held*, 2 Sim. (N. S.) 133.

The instructions given to the jury were stated in such form as to lead them to infer that this action could not be maintained if it appeared that other owners of property in that neighborhood suffered injury and damage similar to that which was sustained by the plaintiff in her estate by the acts of the defendants. This, as applied to the facts in proof, was an error, and renders it necessary that the case should be tried anew.

Exceptions sustained.

CRANFORD v. TYRRELL.

(128 New York, 341.—1891.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiffs.

GRAY, J. In this action, which was brought to restrain the defendant from keeping a house of ill-fame and from using his premises as an assignation house, and to recover damages for injuries sustained, the trial court found as facts that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, "whereby the use and occupation of the plaintiffs' premises have been interfered with and rendered uncomfortable, and whereby the occupants of the plaintiffs' premises have been annoyed and seriously disturbed."

Such a finding was amply justified by the evidence and, indeed, it is not discussed by the appellant; but he argues that the plaintiffs could not maintain a civil action of this nature; inasmuch as the damage they suffered was a damage common to the whole community, and not special to them. If that position had been sustained by the facts, I do not doubt but that it would have been the duty of the trial court to have denied the relief prayed for.

The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on, which may be shown to be immoral and, therefore, prejudicial to the character of the neighborhood, furnishes, of itself, no ground for equitable interference at the suit of a private person; and though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in the common interest, to interfere for the suppression of the common nuisance. See *Francis v. Schoellkopf*, 53 N. Y. 152.

If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit, or uncomfortable. That the perpetrator

of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered. *Rose v. Miles*, 4 M. & S. 101; *Rose v. Groves*, 5 Man. & G. 613; *Francis v. Schoellkopf*, *supra*; *Lansing v. Smith*, 4 Wend. 9. One who uses his property lawfully and reasonably, in a general legal sense, can do injury to nobody. In the full enjoyment of his legal rights in and to his property, the law will not suffer a man to be restrained; but his use of the property must be always such as in no manner to invade the legal rights of his neighbor. The rights of each to the enjoyment and use of their several properties should, in legal contemplation, always be equal. If the balance is destroyed by the act of one, the law gives a remedy in damages, or equity will restrain. If the use of a property is one which renders a neighbor's occupation and enjoyment physically uncomfortable, or which may be hurtful to the health, as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features, a private nuisance is deemed to be established, against which the protection of a court of equity power may be invoked.

In the present case the indecent conduct of the occupants of the defendant's house and the noise therefrom, inasmuch as they rendered the plaintiff's house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action. If it was a nuisance which affected the general neighborhood and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injury sustained and to their equitable right to have its continuance restrained.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

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CONTINUING NUISANCE.

SCHLITZ BREWING CO. v. COMPTON.

(142 Illinois, 511.—1892.)

APPEAL from the Appellate Court, Third District.

This is an action on the case, by the appellee against the appellant company. In the trial court, the verdict and judgment were in favor of the plaintiff, which judgment has been affirmed by the Appellate Court. The declaration consists of two counts. The first count alleges, that plaintiff was possessed of certain premises in Springfield, in which she and her family resided, and that the defendant to wit: on April 20, 1885, wrongfully erected a certain building near said premises in so careless, negligent and improper a manner, that, on said day and afterwards, "and before the commencement of this suit," large quantities of rain-water flowed upon, against and into said premises and the walls, roofs, ceilings, beams, papering, floors, stairs, doors, cellar, basement and other parts thereof, and weakened, injured and damaged the same, by reason whereof said messuage and premises became and are damp and less fit for habitation. The second count alleges that plaintiff was the possessor, occupier and owner of said messuage and premises, in which she and her family dwelt, and the defendant, to wit: on said day, caused quantities of water to run into, against and upon the same, and the walls, roofs, floors, cellars, etc., thereof, and thereby greatly weakened, impaired, wetted and damaged the same, by reason whereof said premises became and were and are damp, incommodious and less fit for habitation. The plea was not guilty.

The proof tends to show, that plaintiff's building is a two-story brick building with a cellar underneath, the front room on the first floor being used as a butcher's shop and the rest of the building being used as a dwelling; that the building was erected several years before that of the defendant; that defendant's building is on the lot west of plaintiff's lot, and is about 60 feet long, having an office in front and a beer-bottling establishment in the rear, and has one roof which slants towards plaintiff's property; that there are three windows on the west side of plaintiff's house, besides the three cellar windows; that her wall is a little over two feet from the west line of her lot; that when it rains the water flows against her west wall and some of it into her windows and cellar from the roof of defendant's building; that the eave-trough is so far below the eave that the water runs over it into the windows, etc.

MAGRUDER, J. Proof was introduced of damage done to plaintiff's

property after the commencement of the suit by reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit."

The question presented is, whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damage resulting both before and after the commencement of the suit.

The rule originally obtaining at common law was, that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. Damages, D. The rule, subsequently prevailing in such actions, is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Wood's *Mayne on Das*. § 103; *Birchard v. Booth*, 4 Wis. 67; *Slater v. Rink*, 18 Ill. 527; *Fetter v. Beale*, 1 Salk. 11; *Howell v. Goodrich*, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict (Com. Dig. 363, tit. Damages, D.); and the reason why, in such cases, all the damages may be recovered in a single action is, that the trespass is the cause of action, and the injury resulting is merely the measure of damages. 5 Am. & Eng. Enc. Law, p. 16, and cases cited in note 2. But in the case of nuisances or repeated trespasses, recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. *McConnel v. McKibbe*, 29 Ill. 483, and 33 id. 175; *The C., R. I. & P. R. R. Co. v. Moffitt*, 75 id. 524; *C., B. & Q. R. R. Co. v. Schaffer*, 124 id. 112. The cause of action, in case of an ordinary nuisance is not so much the act of the defendant, as the injurious consequences resulting from his act; and hence the cause of action does not arise until such consequences occur, nor can the damages be estimated beyond the date of bringing the first suit. 5 Am. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that, where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. *Idem* p. 20, and cases in note. But there is much confusion among the authorities, which attempt to distinguish between cases where successive actions lie, and those in which only one action may be maintained.

This confusion seems to arise from the different views entertained in

regard to the circumstances, under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." 1 Sedgwick on Das. (8th ed.) sec. 94. Some cases hold it to be unreasonable to assume, that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrued up to the date of the bringing of the suit. Other cases take the ground, that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. *Id.* § 94. We think upon the whole that the more correct view is presented in the former class of cases. 1 Sutherland on Das. 199-202; 3 *id.* 369-399; 1 Sedgwick on Das. (8th ed.) §§ 91-94; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Duryea v. Mayor*, 26 Hun, 120; *Blunt v. McCormick*, 3 Denio, 283; *Cooke v. England*, 92 Amer. Dec. 630, notes; *Reed v. State*, 108 N. Y. 407; *Hargreaves v. Kimberly*, 26 W. Va. 787; *Ottenot v. N. Y. L. & W. R'y Co.*, 119 N. Y. 603; *Cobb v. Smith*, 38 Wis. 21; *Delaware & R. Canal Co. v. Wright*, 21 N. J. L. 469; *Wells v. Northampton Co.*, 151 Mass. 46; *Barrick v. Schripperdecker*, 123 N. Y. 52; *Silsby Manuf'g Co. v. State*, 104 N. Y. 562; *Aldworth v. Lynn*, 153 Mass. 53; *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83; *Cooper v. Randall*, 59 Ill. 317; *C. & N. W. Ry. Co. v. Hoag*, 90 Ill. 339. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In *Uline v. N. Y. C. & H. R. R. Co.*, *supra*, a railroad company raised the grade of the street in front of plaintiff's lots, so as to pour the water therefrom down over the sidewalk into the basement of her houses, flooding the same with water and rendering them damp, unhealthy, etc., and injuring the rental value, etc.; in discussing the question of the damages, to which the plaintiff was entitled, the court say: "The question however still remains what damages? All her damages upon the assumption, that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? . . . There has never been in this State before this case the least doubt expressed in any judicial decision . . . that the plaintiff in such a case is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced.

In *Duryea v. Mayor, supra*, the action was brought to recover damages occasioned by the wrongful acts of one, who had discharged water and sewage upon the land of another; and it was held, that no recovery could be had for damages occasioned by the discharge of the water and sewage upon the land after the commencement of the action.

In *Blunt v. McCormick, supra*, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term.

In *Hargreaves v. Kimberly, supra*, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage, which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues."

In *Wells v. N. H. & N. Co., supra*, where a railroad company maintained a culvert under its embankment, which injured land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses; reference was made to *Uline v. Railroad Co., supra*, and the following language was used by the Court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release, or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner."

In *Aldworth v. Lynn, supra*, where the action was for damages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the Supreme Court of Massachusetts say: "The plaintiff excepted to the ruling, that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An

erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. . . . That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case, we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way, as to prevent percolation, with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar, the defendant did not erect the house upon plaintiff's land, but upon his own land. It does not appear, that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages, arising from the negligent and improper construction of defendant's building, to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way, as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show, that the eave-trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said, that the eave-trough was a structure of such permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in *Aldworth v. Lynn*, *supra*. There is a legal obligation to remove a nuisance; and "the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title, to result from the recovery of damages for prospective misconduct." 1 *Suth. on Das.* 199, and notes.

The question now under consideration has been before this Court. In *Cooper v. Randall*, *supra*, the action was for damages to plaintiff's premises, caused by constructing and operating a flouring mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house; it was there held, that the trial court committed no error in refusing to permit the plaintiff to prove, that the dust, thrown upon his premises by the mill after the suit was commenced

had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true, that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said, that it was not the continuing act of the present appellant to allow the roof, or the eave-trough, to remain in such a condition, as to send the water against appellee's house upon the occurrence of a rain-storm. Nor is appellant's house or eave-trough any more permanent than was the mill in the *Cooper* case.

In *C. & N. W. R'y Co. v. Hoag*, *supra*, a railway company had turned its waste from a tank upon the premises of the plaintiff where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared, that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here, the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain-storms, which occurred after the suit was commenced.

We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 Sedgwick on Das. (8th ed.) § 93.

It follows from the foregoing observations, that it was error to allow the plaintiff to introduce proof of damage to her property caused by rain-storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given.

The judgments of the Appellate and Circuit Courts are reversed and the cause is remanded to the Circuit Court.

Judgment reversed.

PARTIES LIABLE.**AHERN v. STEELE.**

(115 New York, 203.—1889.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment at Trial Term in favor of the plaintiff, entered upon a verdict, in an action to recover for the death of plaintiff's son, who, October 8, 1882, without fault on his part, fell through a defective pier in the city of New York, and was drowned.

John Gardner, owner of the pier and other property, died in 1817, devising by will the pier and other property to trustees for the benefit of his children during their lives, and upon their death the property to go to their issue. The pier was set apart for his daughter, Mrs. De Dion, and during her life was under the control and management of a trustee, as provided in the will. Mrs. De Dion died May 22, 1881, leaving two daughters, Rosalie M. Steele, Henrietta Hutton, and a son, Thos. McCarty. The son died April 14, 1882, and the two daughters, the executors of the son, and the lessee of the pier, who did not defend the action, were made defendants herein. At the time of the accident, the two daughters were in Europe, having resided there ever since the death of their mother in 1881.

On May 1, 1880, the trustee rented the pier to one Phelan for a term of five years. It was stipulated in the lease that the lessor should not be responsible for any defects nor for any loss caused by fault or neglect of any tenant, and that the lessor should be permitted to enter to make repairs, if he should so desire, but that he should not be obliged to repair.

Prior to July 29, 1881, Mrs. Steele brought an action for partition against her brother and sister, the pier being included in the property sought to be partitioned, and on July, 29, 1881, a receiver was appointed of the rents, issues and profits of the premises to be partitioned, and on November 5, 1881, an order was made directing the receiver to set apart quarterly a sum sufficient to make a yearly total of \$17,500, to be applied to the payment of taxes, insurance, necessary repairs and other expenses, and to pay the remainder, if any, to the beneficiaries.

At the trial it was shown that the pier was defective on May 1, 1880, at the time of the execution of the lease, and that it remained defective and out of repair down to the time of the accident.

EARL, J. The will of John Gardner came under consideration in *Greason v. Keteltas*, 17 N. Y. 491, and it was there held that the trustee under that will took an estate in fee, determinable when the purpose

of the trust should cease and that such a trustee had power at law to lease for a term which might extend beyond the period of his trust estate. The lease executed by the trustee to Pheland for a term of five years from May 1, 1880, was, therefore, valid for the whole term, and had nearly four years to run at the time of Mrs. De Dion's death, and more than two years at the time of the accident. Hence any reasoning based upon the postulate that the defendants could have terminated the lease before the end of the term will lead to inevitable error.

There was no proof, even if that were in any way important, that the pier was out of repair in 1817, when Gardner died. It became out of repair and defective at some time during the existence of the trust estate, and in that condition it was demised by the trustee. By demising the pier while it was in such a condition as to be a nuisance, the trustee was guilty of a misfeasance, and during the existence of his estate, notwithstanding the lease, he would have been responsible for any damage caused by the nuisance. Even if he had been the trustee of Mrs. De-Dion's children, and they had been the beneficiaries under the trust, they would not have been responsible for any nuisance created or permitted by him; and so it was held in *People v. Townsend*, 3 Hill. 479. But he was not trustee for them; they derived no title or benefit from him and had no connection whatever with him. They took their title under the will of John Gardner, and were in no way responsible for what the trustee did, or omitted to do, upon the trust estate.

We have, then, this question for our determination: Are the children of Mrs. De Dion, who became full owners of this pier at the death of their mother, subject to a valid outstanding lease, responsible for a nuisance created thereon during the existence of the precedent estate, without any notice thereof? I have carefully examined the English and American authorities, and confidently assert that there is not an authority to be found in the books imposing such responsibility.

It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, and he alone, to whom such responsibility generally and *prima facie* attaches. *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Kirby v. Boylston Market Assn.*, 14 Gray, 249; *City of Lowell v. Spaulding*, 4 Cush. 277; *Inhabitants of Oakham v. Holbrook*, 11 id. 299. The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair, and thus they become a nuisance; if he demises premises to be used as a nuisance, or for a business, or in a way so that they will necessarily become a nuisance. In all such cases I believe there is now no dispute that the owner would

be liable. But an owner who has demised premises for a term during which they become ruinous, and thus a nuisance, is not responsible for the nuisance unless he has covenanted to repair. It has even been held in some cases that an owner may demise premises so defective and out of repair as to be a nuisance, and if he binds his tenant to make the repairs he is not responsible for the nuisance during the term. *Pretty v. Bickmore*, *supra*; *Gwinnell v. Eamer*, L. R. 10 C. P. 658; *Leonard v. Storer*, 115 Mass. 86. But these cases are not in entire harmony with the decisions in our own state, and probably would not now be generally received as authority in this country or in England.

A grantee or devisee of premises, upon which there is a nuisance at the time the title passes, is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate the same. The authorities to this effect are so numerous and uniform that the rule which they establish ought no longer to be open to question. One of the earliest, if not the earliest case in which this rule was announced, is *Penruddock's Case*, 5 Coke, 100 b, where it was resolved that an action lies against one who erects a nuisance without any request made to abate it, but not against the feoffee, unless he does not remove the nuisance after request; and in *Pierson v. Glean*, 14 N. J. Law, 37, Chief Justice HORNBLOWER said: "The law, as settled in *Penruddock's Case*, has never, I believe, been seriously questioned since." In *Plumer v. Harper*, 3 N. H. 88, RICHARDSON, Ch. J., said: "When he who erects the nuisance conveys the land he does not transfer the liability to his grantee, for it is agreed in all the books that the grantee is not liable until upon request he refuses to remove the nuisance." In *Woodman v. Tufts*, 9 N. H. 88, it was held that where a dam was erected, and land flowed by the grantor of an individual, the grantee will not be liable for damages in continuing the dam and flowing the land as before, except on notice of damage and request to remove the nuisance or withdraw the water. In *Eastman v. Company*, 44 N. H. 144, it was held that no notice or request to abate the nuisance is necessary before bringing suit against the original wrong-doer in such cases for the damages done; but that the grantee of the nuisance is not liable to the party injured until, upon request made, he refuses to remove the nuisance. SARGENT, J., writing the opinion, said: "The doctrine of the cases in this state and elsewhere is that he who erects a nuisance does not by conveying the land to another transfer the liability for the erection to the grantee; and the grantee is not liable until upon request he refuses to remove the nuisance, for the reason that he cannot know until such request but the dam was rightfully erected; and there can be no injury in holding to this doctrine, as the original wrong-doer continues liable notwithstanding his alienation." To the same effect is *Carleton v. Redington*, 21 N. H. 291. In *Johnson v. Lewis*, 13 Conn. 303, where it

appeared, in an action for the obstruction of a water-course by raising a dam, that the dam creating the obstruction was erected by the defendant's grantor, it was held that the plaintiff could not recover without proving a special request to the defendant to remove the obstruction. SHERMAN, J., writing the opinion, said: "The law is well settled that a purchaser of the property on which a nuisance is erected is not liable for its continuance, unless he has been requested to remove it. This rule is very reasonable. The purchaser of property might be subjected to great injustice if he were made responsible for consequences of which he was ignorant and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured:" and so also it was held in *Noves v. Stillman*, 24 Conn. 15. In *Pillsbury v. Moore*, 44 Me. 154, it was held that a purchaser of property, on which a nuisance is erected, is not liable for its continuance unless he has been requested to remove it. In *Pierson v. Glean*, *supra*, it was held that an action for continuing a nuisance cannot be maintained against him who did not erect it without a previous request to him to remove or abate it. In *Beavers v. Trimmer*, 25 N. J. Law, 97, it was held that when the action is not brought against the original erector of a nuisance, but against a subsequent owner or tenant, a special request to remove it must be alleged. In *McDonough v. Gilman*, 3 Allen, 264, it was held that a tenant for years is not liable for keeping a nuisance as it used to be before the commencement of his tenancy if he had not been requested to remove it or done any new act which of itself was a nuisance. And the same rule has repeatedly been laid down in this state. In *Hubbard v. Russell*, 24 Barb. 404, an action against the continuator of a private nuisance originally erected by another to recover damages for the injury sustained thereby, it was held that the plaintiff must prove to the defendant of its existence and a request to remove it. In *Miller v. Church*, 2 T. & C. 259, in an action to recover damages for the overflow of a mill pond, it was shown that the defendant, the owner of the pond, was not in possession, having leased the same to a third party, and it was held that the owner of the premises overflowed could not recover for such overflow without showing that the defendant had notice or knowledge of the existence of the same before the action was brought. And the same rules, without any variation, are laid down by all the text-writers. In *Chitty on Pleadings*, 71, it is said that every occupier is liable for the continuance of a nuisance on his own land, though erected by another, if he refuses to remove the same after notice. And in 2 *Chitty on Pleadings*, 333, note C, the author also adds that if the action is not brought against the original erector of the nuisance, but against his feoffee, lessee, etc., it is necessary to allege a special request to the defendant to remove it. In *Cooley on Torts*, 611, the learned author says: "A party who comes into possession of land as grantee or

lessee, with a nuisance already upon it, is not in general liable for the continuance of the nuisance until his attention has been called to it and he has been requested to abate it." In 1 Hillard on Torts (3d Ed.), 574, it is said: "That a person who continues a nuisance erected by another is liable therefor at the suit of any party damaged thereby if he had knowledge of its hurtful tendency, or more especially if notified or requested to remove it." In Moak's Underhill on Torts, 253-255, the learned editor, with many citations of authorities to sustain him says: "Where premises are out of repair at the time they are leased in particulars which the landlord is bound as against third persons not to allow, the landlord is liable for any injuries sustained by a third person for such want of repair. But not even in such case if the tenant's use is what produces the injury." "A landlord who negligently or improperly constructs his premises—as a dam—or where they become defective, after notice suffers them to remain so, is liable to his tenant or a stranger, who being himself free from fault, is injured thereby." "Where a lessee or grantee continues a nuisance of a nature not essentially unlawful, he is liable to an action for it only after notice to reform or abate it." In Addison on Torts (Wood's Am. Ed.), § 240, it is said: And so an action will lie against the landlord for a permanent nuisance, although the nuisance was created before the reversion came to him, *i. e.*, if he knew of it and might have determined the tenancy before the injury happened, as in the case of a tenancy from year to year. "If an action is brought against the originator of a nuisance, it is not necessary to demand the abatement or discontinuance of the nuisance before commencing the action, but if the action is brought against the mere continuance of a preceding nuisance, a request to remove the nuisance must be made before the action is commenced." § 280. "The occupier of lands is in general responsible for the continuance of a nuisance upon them; and so is the landlord if the nuisance existed at the time he demised them or created the tenancy after he had the power of determining it." § 283.

According to these authorities the simple fact that the three children of Mrs. De Dion became owners of the pier upon the death of their mother, did not make them responsible for this nuisance then existing. Suppose this accident had happened an hour, or a day, or one week after the death of their mother, would they have been responsible, even if the pier had come to them not subject to any lease? To cast such a responsibility upon a grantee or devisee might imperil his whole fortune. Before it can be cast in such a case, he must have notice of the nuisance and a reasonable time to abate it. There must be some fault, some *delictum* on his part, and his liability can have no other basis. The notice required to put him in fault may be proved like any other fact. The mere fact that the owner personally occupies the premises upon which the nuisance is alleged to exist is not always sufficient to charge him with

notice of its existence. It may, like a dam, or a building obstructing ancient lights, be of such a nature that he may rightfully suppose that he has the right to maintain it; or it may be of such a character that he may not know of its harmful tendency, in such cases he must have actual notice that the structure is a nuisance; and there may be cases in which, besides notice, there must be a request to abate. But where the structure or the condition of premises is such as to be absolutely a nuisance, plainly visible, so that an occupier may see and know the nuisance and its dangerous character or hurtful tendency, then an owner in the occupation of the premises may, from his mere occupancy, be charged with notice thereof. In this case if these defendants had gone into possession of this pier personally, or by their agents, its character was such that they must have known that it was dangerous and a nuisance, and no direct proof of notice would have been required to charge them; it could have been inferred. But when there is no proof that the owners of premises which came to them with a nuisance existing thereon without their fault, were ever in possession of the premises, or ever even saw them, there is no possible ground for charging them with notice or imputing to them legal fault.

But the position of these defendants is stronger than the one we have just been dealing with. This pier came to them, not only with this nuisance existing thereon, but subject to an outstanding lease for some years which they had no power to terminate. The lessee who occupied and used the pier was under obligation to the public to see that it did not become a nuisance, and it was his duty to respond for any damage sustained by any person from the nuisance. The owners of the reversion had the right, in the absence of notice, to suppose that he would discharge such duty and protect the public, and they were under no obligations to see by watchful vigilance that he performed such duty. And so it has been held in all the analogous cases, that the landlord, in the absence of notice, is liable only in case he demised the premises with the nuisance thereon. In *Roswell v. Prior*, 2 Salkeld, 460, a tenant for years erected a nuisance and afterwards made an under-lease, and the question was whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease. And it was held that it would, "for he transferred it with the original wrong, and his demise affirms the continuance of it." In *Todd v. Flight*, 9 C. B. (N. S.) 377, it was held that an action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them to remain so until by reason of the want of reparation they fall upon and injure the house of an adjoining owner. In *Nelson v. Liverpool Brewing Company*, L. R. 2 C. P. Div. 311, it was held that a landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has

contracted with the tenant to repair, or where he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition, and that in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy. LOPES, J., writing the opinion, said: "We think there are only two ways in which landlords or owners can be made liable in the case of injury to a stranger by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable—first in the case of a contract by the landlord to do repairs where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner." In *Woodfall's Landlord and Tenant* (13th ed.) 735, it is said: "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition; and the only exceptions to the rule appear to arise when the landlord has either (1) contracted with the tenant to repair; or (2) where he has let the premises in a ruinous condition; or (3) where he has expressly licensed the tenant to do acts amounting to a nuisance." In *Knauss v. Brua*, 107 Penn. 85, repeated in *Fow v. Roberts*, 108 id. 489, it is said: "We do not doubt but that in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises whilst in the possession of a tenant." In *City of Lowell v. Spaulding*, 4 Cush. 277, SHAW, Ch. J., said: "By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant that the former shall keep the premises in repair so that in case of a recovery against the tenant he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord. But such express agreement must be distinctly proved." And to the same effect is *Lorne v. Farren Hotel Company*, 116 Mass. 67. In *Cunningham v. Cambridge Savings Bank*, 138 Mass. 480, MORRIS, Ch. J., said: "It is often said in the cases that the occupier, and not the owner, of a building is liable to third persons for damages arising from any defect. But by occupier is meant, not merely the person who physically occupies the building, but the person who occupies it as a tenant having the control of it, and being, as to the public, under the duty of keeping it in repair." In *Dalay v. Savage*, 145 Mass. 38, land abutting on a public street in a city was sold under a power contained in a mortgage, and the owner of the equity of redemp-

tion released any title he might have to the purchaser, and was allowed by the purchaser to remain in possession under an agreement that he should pay rent at a certain rate monthly. At the time of the sale there was an open and visible defect in the cover of a coal hole in the sidewalk in front of a house on the land, which hole led to the cellar of the house. In consequence of this defect, during the tenancy, a person walking on the sidewalk fell into the hole, and it was held that he could maintain an action against the purchaser of the land for the injury thereby sustained. FIELD, J., writing the opinion, said: "It seems to be settled that if the landlord lets premises abutting upon a way which were from their condition or construction dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered therefrom, although the premises are occupied by a tenant." "The reason of the rule that if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injury suffered therefrom, is that by letting he has authorized the continuance of the nuisance," and the learned judge further said: "If the defendant had bought the premises subject to a lease to Breslin, [the tenant,] who had continued in occupation under it, a different case would have been presented;" and he held the defendant responsible for the nuisance solely on the ground that he had demised the premises with the nuisance thereon. In *Nugent v. B. C. & M. Railroad Company*, 80 Me. 62, 77, VIRGIN, J., writing the opinion, said: "It is settled law that where the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit he authorizes a continuance of the condition they were in when he let them, and is, therefore, guilty of misfeasance." In *Joyce v. Martin*, 15 R. I. 558, A., owning a defective wharf used in connection with a public resort, and knowing the defect, leased the place and wharf to B., who learned of the wharf defect after accepting the lease, but continued to use the wharf and place for public resort; and in an action for damages to C., who was injured by the wharf defect, it was held that the action was maintainable against both A. and B. jointly—against A. solely on the ground that he knew the wharf was defective when he let it.

In *Owings v. Jones*, 9 Md. 108, the plaintiff sued for damages for injuries by falling into a vault appurtenant to the property of the defendant, and built under the sidewalk of a public street. It was shown in defense that the property had been leased by the defendant for the term of seven years, for an annual rent, and the court held that the defendant was not relieved from liability if the vault was so constructed as to be unsafe for passers-by when the premises were let, or as to be

liable to become unsafe in the necessary opening for the purpose of cleaning it; and it laid down the following rules: (1) When property is demised and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happens during such possession, the owner is not liable. (2) But where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, and receives rent, then, whether in or out of possession, he is liable for injuries received from such nuisance. In *Albert v. State*, 66 Md. 325, the action was brought by a minor for damages sustained by him by the death of his parents, who were drowned by reason of the defectiveness of a wharf in the occupation of the defendant's tenant. The instruction given on the trial was that, "if the jury found that the defendant was the owner of the wharf and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover;" and this was, upon appeal, held to be a correct exposition of the law. In *Clancy v. Byrne*, 56 N. Y. 129, the true rule was fully apprehended by FOLGER, J., who wrote the opinion. That was a case where plaintiff's horse fell through a defective pier, and the action was against a lessee who had covenanted with his landlord to make all ordinary repairs. The lessee had sublet the pier, and was not in the occupancy thereof, and it was held that if premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or to the public during the continuance of the lease, unless he has expressly agreed to repair or has renewed the lease after need of repair has shown itself; and that this rule applies to a lessee out of possession who has sublet to another who is in possession. The learned judge said: "Generally speaking, the person responsible for a nuisance is he who is in occupation of the premises on which it exists." "As between him who is landlord and owner and him who is the lessee and occupant of the premises, there is, in general, no obligation upon the former to keep them in repair where he has made no express contract to that effect." "Numerous authorities are cited. We have examined all of them. It will be found that in them the liability of the defendant is placed upon one of these grounds, viz.: That he owned or had rights in the premises, and leased them with the nuisance upon them; that he was in the possession of the premises and used them in their defective condition; that he was under a contract enforceable by plaintiff to keep the premises in repair and failed so to do; that he, in the first instance, created the nuisance and put it in the power of others to continue it; or that, being a municipal corporation, there was a duty upon it to repair. If there are authorities which, in the

remarks of the court, reach farther than this, they will be found to go beyond the needs of the case in hand." In *Jaffe v. Harteau*, 56 N. Y. 398, it was held that a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended. In *Swords v. Edgar*, 59 N. Y. 28, the plaintiff's intestate was so injured by the falling of a defective pier that he died, and the action was brought to recover damages caused by his death. The defendant, the landlord had rented the pier to a tenant who was in possession thereof at the time of the accident; and the defendant was held liable solely on the ground that he had demised the pier while the same was in a defective condition. In *Wenzlick v. McCotter*, 87 N. Y. 122, it was held that where a person acquires title to land upon which is a nuisance, the mere omission to abate or remove it does not render him liable; and that there must be something amounting to actual use, or a request to abate the nuisance must be shown. In *Edwards v. New York and Harlem Railroad Company*, 98 N. Y. 247, it is said: "If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises knowing that they are dangerous and unfit for the use for which they are used, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But when the landlord has created no nuisance and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him." *Wolf v. Kilpatrick*, 101 N. Y. 146, is an instructive case. There the defendants were owners of certain premises in the city of New York, which they leased to M., who, under and in accordance with a permit from the city, built vaults under the sidewalk in front thereof, with a coal-hole, which was properly constructed, and in the usual and permitted manner. Through the wrongful act of a stranger, who broke the stone supporting the iron cover of the coal-hole, the cover turned when the plaintiff stepped upon it, and he fell and was

injured. In an action to recover damages, it did not appear that the defendants had any knowledge or notice of the defect, and it was held that they were not liable; that they would not have been liable had they themselves constructed the vaults lawfully and with due prudence and care, and thereafter transferred possession of the premises to a third person without covenant on their part to repair; that if the coal-hole became a nuisance after the stone was broken, only the person who created the nuisance, or he who suffered it to continue, was responsible; that a party out of possession and control and who had no knowledge, actual or constructive, of the defect, could not be said to have suffered it to continue; that a landlord out of possession is not responsible for an after-occurring nuisance unless, in some manner, he is in fault for its construction or continuance, and that the bare ownership will not produce this result. FINCH, J., said: "How can it be said that they (the defendants) suffered it (the nuisance) to continue and so failed in their duty if they had no knowledge, actual or constructive, of the defect, and were out of possession and control?" "It is quite certain that the plaintiff in this case was bound to establish some fault of omission or commission on the part of the landlord tending to the injury, and barely showing him to be the owner is not enough. There was no fault of commission. There could be no fault of omission unless the landlord was bound to repair the defect, had actual or constructive notice of its existence, or was bound at his peril to discover and to remove it." In *Walsh v. Mead*, 8 Hun, 387, DANIELS, J., said: "The erection and maintenance of a nuisance is a wrong, and by leasing the building affected by it to another person, the owner continues it, and stipulates for the enjoyment of the profit from it." In 1 Thompson on Negligence, 317, the learned author has concisely stated the law of nuisance in harmony with all these cases.

Now, within these authorities, what ground is there for imposing liability upon these defendants for this nuisance? They did not create it, and had no connection whatever with those who did create it. They were not bound by the lease to repair the pier. They did not demise the pier with the nuisance thereon, and they had no notice, actual or presumptive, of the existence of the nuisance. None of the grounds of liability exist which are mentioned by Judge FOLGER in *Clancy v. Byrne*. They were simply entitled to the rent; it is not even proved that they actually received any. But it has never been held in any case that the receipt of rent imposes responsibility upon a landlord for a nuisance for which he is not otherwise responsible. Landlords always are entitled to rent; and if the mere receipt of rent would make them responsible for a nuisance upon the demised premises, then they would always be responsible, irrespective of other circumstances which have always been deemed necessary to create the responsibility.

The fact that the defendants, under the lease, had a right to go upon

the pier and make repairs, if they should see fit to do so, is wholly immaterial in this case. Even when an owner demises premises and covenants to repair, the covenant cannot inure directly to the benefit of a third person not a party thereto. But in such case the third person injured because, for want of repairs, the demised premises have become a nuisance, has a cause of action primarily against the tenant. But because the tenant in case of a recovery against him could sue his landlord for indemnity upon the covenant, to prevent circuitry of action, the person injured may bring his action against the landlord, not because the landlord owed him any duty to repair, but because he owed that duty to his tenant. It would have been wholly immaterial if these defendants, owners of the pier, had let it without reserving any right to go upon it for repairs, and even if they could not have gone upon it for repairs without being trespassers. *Fish v. Dodge*, 4 Denio, 311; *Swords v. Edgar*, *supra*. There is no case which holds that whether the landlord can or cannot go upon the demised premises to make repairs is a material circumstance affecting his liability for a nuisance existing thereon. It was held in *Clancy v. Byrne*, *supra*, that a lessee who has covenanted with his landlord to repair is not responsible to a stranger for a nuisance upon the demised premises while in the possession of a subtenant to whom he had let them. As he had made no covenant to repair with his tenant, and was not bound to indemnify him, the person injured could not maintain an action against him, although he had covenanted with his landlord to repair. Here, according to the law of that case, if these owners had even been under a covenant with the predecessors in the title or with any other person but Phelan, to keep this pier in repair, their breach of the covenant and failure to discharge their duty to their covenantee would not have made them liable for the death of the child; and with much less reason can such a liability spring from a mere stipulation in a lease made by one for whose acts they are in no way responsible which merely put it in their power to make the repairs. In cases where it is said that a landlord bound to make repairs upon demised premises is responsible for a nuisance thereon, the obligation to make the repairs was one existing between him and the tenant. *Russell v. Shenton*, 2 Gale & D. 573. The whole argument on this point is summed up in the statement that, as there was here no breach by the defendants of any duty due from them to the tenant, the stipulations in the lease do not concern a stranger thereto.

There is no authority from the reported decisions or from the text-books which imposes upon the landlord, not otherwise liable for a nuisance upon demised premises, the duty of active vigilance to ascertain their condition. A landlord has never been held responsible for a nuisance because he did not himself obtain notice of its existence. But it has always been held to be the duty of any person seeking to enforce the

landlord's responsibility for a nuisance to show that he had such notice.

There are two cases to which I have not yet referred, which are so like this in all material particulars that they ought to be received as conclusive authority for the defense of this action. In *Woram v. Noble*, 41 Hun, 398, a case entirely similar to this, the action was brought to recover damages for an injury sustained in consequence of a defective coal-hole; and it appeared that the defendant became the owner of the premises in September, 1883, subject to a lease to a tenant expiring May 1, 1884, which required the tenant to make all repairs; that the coal-hole was then in the sidewalk, but it had not been constructed by the defendant, nor did he have any notice or knowledge of its defective condition, although the tenant had noticed the depression in the stone about a year previous to the accident; and it was held that the defendant could not, in the absence of any evidence to show that he was responsible for the condition of the coal-hole or had knowledge of its defective condition, be held liable for the injury sustained by the plaintiff. The judge writing the opinion said: "We find no judicial decision and no principle enunciated in any elementary work that will furnish a basis for a recovery against the defendant in this action. He did not construct the work that became a nuisance, and he did not continue it in any legal sense." There, as here, the defendant became the owner subject to a lease, and the nuisance existed at the time he became such owner, and it was held that he could not be made liable for the accident without proof of notice to him of the existence of the nuisance. In *Conhocton Stone Road v. New York and Erie Railroad Co.*, 51 N. Y. 573, the action was brought to recover damages for injuries to the plaintiff's road-bed, caused by the same being washed and flooded in the years 1864 and 1865, by reason of an embankment and bridge built over a creek by a prior owner of the defendant's road in 1851 or 1852. The defendant became the owner of the embankment, bridge and of its road by purchase at a foreclosure sale in 1857, and in February, 1863, it leased its road, including the embankment and bridge, to the Erie Railroad Company, which took possession of the road and had possession under its lease at the time of the damage complained of by the plaintiff; and the general rule was affirmed that in order to maintain an action for damages resulting from a nuisance upon defendant's land where such nuisance was erected by a prior owner before conveyance to defendant, it is necessary to show that before the commencement of the action he had notice or knowledge of the existence of the nuisance, but that it is not necessary to prove a request to abate it. Judge LOTT, writing the opinion, said: "Where persons succeeding to the ownership of land on which a nuisance had previously been erected have been held liable for damages resulting from its subsequent continuance, it appeared either that it was after

notice of its existence or that the question of such notice had not been raised at the trial." That case is a most emphatic authority for the defendants here. There the defendant became the owner of the premises with the nuisance existing thereon, and actually leased them in the same condition to another company which was in possession at the time of the damage complained of, and yet, in the absence of proof that the defendant had notice of the nuisance, it was held not to be liable for damages caused thereby.

It is frequently said that a landlord who has demised premises with a nuisance thereon, continues liable for the nuisance, although he did not create it, because it was a misfeasance to demise them in that condition. But it will be found that all, or nearly all, the cases in which this has been said are cases in which, at the time of the demise, the landlord had notice of the nuisance. In the case last cited the defendant demised the premises with the nuisance thereon, and yet it was held not to be liable because there was no proof of notice.

I will now notice the principal cases which are supposed to be in conflict with some of the views I have expressed and with the conclusion I have reached. In *Brown v. Cayuga and Susquehanna Railroad Co.*, 12 N. Y. 486, the predecessor of the defendant had constructed its road across a stream of water in such a manner as to cause the stream to overflow and damage the lands of the plaintiff. Upon the trial the defendant insisted that, inasmuch as it had no agency in building the obstruction in the stream or in making the excavation through the bank, but that had been done by the old company, it was not liable, and upon this ground it moved for a nonsuit, which was denied. Upon the appeal it was held that the defendant could not have the benefit of the point that there had been no request to abate the nuisance because it was in no way taken at the trial, and hence the case was treated as if the request had actually been made and proven. The point decided, as stated in the head-note, is that "the successor to the title and possession of property who omits to abate a nuisance erected thereon by another, after notice to do so, is liable for the damage caused by its continuance." Judge DENIO, writing one of the opinions, held that an action on the case will lie against one who continues a nuisance by which damage is occasioned to the plaintiff without notice first given to remove it. He cited no authority sustaining his views, but cited authorities in conflict with them, holding that they were not binding upon the court. But it is expressly stated that the court did not pass upon the question whether the defendant was liable, without notice, to remove the obstruction and restore the bank of the stream; and the views of Judge DENIO, besides having the support of no authority in this country or England, were distinctly repudiated in *Conhocton Stone Road v. Buffalo, New York & Erie Railroad Co.*, *supra*. In *McCarthy v. Syracuse*, 46 N. Y. 194, damage

was caused by a defective city sewer which it was the duty of the city to keep in repair, and it was held liable for the damage without notice of the defect in the sewer, because it had omitted to discharge that duty. That case bears no analogy to this. In *Irvine v. Wood*, 51 N. Y. 224, the action was against lessor and lessee to recover for injuries sustained by the plaintiff from a defective coal-hole in the street. The plaintiff recovered against both defendants and both appealed, but the lessor abandoned his appeal, and the case was argued only on behalf of the lessee who had maintained and used the coal-hole in its defective condition, and it was held that he was liable. The main litigation at the trial was as to the liability of the lessee which rested upon plain principles of law, and the case is authority only as to such liability. No point or claim was made at the trial that the landlord had no notice of the defective condition of the coal-hole, or that he could be made liable for the accident only upon proof of such notice, and no such point was before the court upon the appeal. In *Swords v. Edgar*, *supra*, as stated above, the action was against the landlord, who demised the pier when it was in a defective and dangerous condition, and the case is a valuable authority for the views I have expressed. In *Beck v. Carter*, 68 N. Y. 283, and *Clifford v. Dam*, 81 id. 52, the actions were in each case against the defendant, who had himself created the nuisance. While in *Bellows v. Sackett*, 15 Barb. 96, some things were said by the judge writing the opinion which are not now the law, the case was properly decided, because there the defendant, the landlord, erected the nuisance and demised the premises with the nuisance thereon. *Rex v. Pedly*, 1 Adol. & E. 822, is much relied upon by the plaintiff as an authority in his favor. There the defendant purchased premises which were in the occupancy of tenants under a demise for short periods of time from the prior owner, and a nuisance arose thereon after the purchase and after the defendant began to receive the rents. The defendant, the periods being short, was treated as having relet the premises to the tenants with the nuisance thereon, and it was held that he thereby became liable for the nuisance; and upon that ground the decision can stand in harmony with all the cases I have cited. But the court seems to have gone further and affirmed a proposition, not necessary for the decision, that such a reversioner is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest or abating the nuisance. That proposition is unsound; and as to that the case has been overruled and distinctly repudiated in England. In *Rich v. Basterfield*, C. B. Rep. 784, the case of *Rex v. Pedly*, was largely criticised, and CRESSWELL, J., writing the opinion, said of it that "if *Rex v. Pedly* is to be considered as a case in which the defendant was held, because he had demised the buildings where the nuisance existed, or because he had relet

them after the user of the buildings had created the nuisance, or because he had undertaken the cleansing, and had not performed it, we think the judgment right and that it does not militate against our present decision. But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases, and we cannot assent to it." In *Todd v. Flight*, *supra*, *Rex v. Pedly* was cited as holding that if the defendant demised the privy either when it had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance. In *Russell v. Shenton*, *supra*, it was said by Lord Ch. J. DENMON, in reference to *Rex v. Pedly*, that "it was an indictment against the owners of houses and privies which had been built for the very purpose of being so used as to create a nuisance unless the owner took effectual means to prevent it. These means not having been adopted, the owner who received rents for both was held liable for the public nuisance." In the case of *Gandy v. Jubber*, 5 B. & S. 78, the owner of premises attached to which was an area, let the same to a tenant from year to year and died, having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance, to the defendant, who having no notice of the nuisance suffered the tenant to remain in occupation of the premises upon the same terms as before, receiving rent; and it was held that he was liable for damages caused by the nuisance on the ground that he had relet the premises with the nuisance thereon. That case is in no way an authority for the plaintiff, but by implication the point decided strongly favors the contention of the defendants. It is clear that the court was of the opinion that the defendant would not have been liable but for the fact that he had let the premises with the nuisance thereon. That case went by appeal to the Exchequer Chamber, and is again reported in the same volume, at page 485; and it was there strenuously contended on behalf of the defendant that he was not liable because he could not be treated as having demised the premises with the nuisance thereon and because he had no notice of the nuisance. The court took the case under consideration and finally recommended the plaintiff to accept a *stet processus*, (substantially a final stay of proceedings,) and the plaintiff accepted it, evidently induced so to do because of information that the judgment would go against him. In the course of the argument in the Exchequer Chamber, Chief Justice ERLE said of the landlord's liability: "If he lets the premises with a nuisance, all parties agree that he is responsible." The reasons why the Exchequer Chamber recommended that the plaintiff should accept a *stet processus* do not appear in the report. But in 9 Best & Smith, 15, there is what purports to be the undelivered opinion of the court in that case, showing that the court

had unanimously come to the conclusion to reverse the judgment of the Queen's Bench; and in the opinion the case of *Rex v. Peddy* was again criticised, explained and limited as in prior cases. One question in the case, was, whether a landlord, who has the power to determine a tenancy from year to year by giving notice, and who does not exercise it, is to be held as thereby reletting the premises. In the opinion published in 9 Best & Smith, the ground on which the Exchequer Chamber differed from that of the Queen's Bench distinctly appears as follows: "We agree that, to bring liability home to the owner, the premises being let, the nuisance must be one which was, in its very essence and nature, a nuisance at the time of the letting, and not something which was capable of being thereafter repdered a nuisance by the tenant, and that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise; but that wherein we differ is, that a landlord, from year to year, having the power to give the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such failing to give notice is equivalent to a reletting." That case, then, is an authority that, upon such facts as we have here, devisees of premises under a lease for a term with no power in the devisees to terminate the lease during the term, such devisees are not liable, although they received rent, for a nuisance which they did not cause, create or authorize. In *Salmon v. Bensley*, Ry. & M. 189, a *nisi prius* case of very doubtful authority, it was held that a notice to remove the nuisance left at the premises is evidence against a subsequent occupier. That case has no bearing upon this because the defendants were not subsequent occupiers; they never occupied, and did not continue the nuisance. The pier remained in the occupancy of Phelan. Besides, there is no question of notice in this case, as the court held, as matter of law, that the defendants were responsible if the nuisance existed at the time of the demise to Phelan. In Wood's Landlord and Tenant, 618, the author says: "Where a nuisance results from such want of repair, and there is no covenant to repair on the part of either landlord or tenant, an action may be maintained against either of them therefor." But he was speaking of repairs which the landlord was bound by some law to make. But there is no general law and no rule of law which imposes upon the landlord the duty to make repairs upon premises in the occupancy of his tenant. At page 917 the learned author states the proper rule in harmony with all I have said. There he says: "The landlord's right of possession being suspended during the term, it follows that his liabilities in respect to the possession are also suspended in respect to such matters or defects in the premises as existed when the premises were let arising from the manner of use or defective construction. If a nuisance existed upon the premises at the time of the demise, the landlord as well as the tenant

is liable for the damages resulting therefrom, although it only becomes a nuisance by the act of the tenant in using it for ordinary purposes. And if the tenant creates a nuisance upon the premises during the term by an unusual or extraordinary use thereof, although the landlord cannot be made chargeable for the consequences in the first instance, yet if he subsequently renews the lease with the nuisance thereon, he becomes chargeable therefor, the same as though the nuisance had existed at the time of the original demise; and when a person is in possession as a tenant from year to year, each year is treated as a reletting, so that the landlord becomes chargeable for a nuisance created by the tenant during a previous year which is in existence at the commencement of the new year;" and there is more to the same effect, as there is also in Wood's Law of Nuisance, 78, 141.

If Phelan had been the mere servant or agent of the defendants, and had caused or permitted this or any other nuisance upon the pier, then the defendants would have been responsible for it, and the cases of *Clark v. Fry*, 8 Ohio St. 358, and *Ellis v. Sheffield Gas Co.*, 2 Ellis & Black, 767, would have been in point.

It is said that many of the cases I have cited were nuisances created by damming, obstructing, polluting and diverting streams, and that they are not, therefore, applicable. Why are they not applicable? They were all decided by the application of the general law of nuisance, and it has never been suggested in any case that there is any law of nuisance peculiar to such cases, and that they are not to be governed by the same rules that apply to other nuisances. They announce general rules in terms applicable to all cases of nuisance.

If it is at all material, it is a mistake to assume that the children of Mrs. De Dion first became owners of this pier upon the death of their mother. Under the will of their grandfather, John Gardner, they had vested remainders therein long before the death of their mother, and long before the pier was out of repair. They took no new title upon the death of their mother. The estate which was before in them was simply enlarged by the disappearance of the precedent estate. Were they bound in some way to divest themselves of the estate which they had long had in order to escape responsibility for a nuisance which they had not created or authorized? Or, if they did not or could not do that, were they bound to go upon the pier and possibly expend in repairs more than the entire income therefrom to escape responsibility for the nuisance? And were they bound to do this at the peril of great damages, without notice of the nuisance, while the pier was in the possession of a tenant who had hired it from a stranger to them at a small rent, because it was out of repair, and who was under a duty to the public to keep it safe and in repair? If the children of Mrs. De Dion had, upon the death of their mother, demised this pier without any covenant to repair, and

it had become out of repair and a nuisance during the term of the demise, they would not have been responsible for the nuisance; and why should a greater responsibility be cast upon them because the pier came to them subject to the demise? What have they done to incur the responsibility? If they had demised the pier knowing it was out of repair, they would have been guilty of continuing the nuisance, and upon that ground would have been responsible for it. But they have done nothing. They neither created, authorized or continued the nuisance, and they were not bound by contract or the law to discharge a duty which rested upon the tenant.

I am confident that a holding that the defendants are liable to the plaintiffs for the consequences of this nuisance would be a departure from the law of nuisance as universally approved in the books.

I have not thus far alluded to the claim of the defendants, that they may find protection in the fact that a receiver had been appointed of the rents. It is not necessary to determine whether that fact furnishes them an independent defense. The pier and other property came to them as tenants in common. One was a lunatic, and a partition on that account became important, if not necessary. An action was commenced by one tenant in common against the other two, and a receiver was appointed to take the rents which accrued after the death of their mother. The receiver thus appointed was not their agent. If he had created any nuisance or done any other wrong, they would not have been responsible for it. He was the agent and officer of the court, bound to obey its directions, and subject to its control. It ordered him to take and retain sufficient of the rents, otherwise payable to the defendants, to make necessary repairs. Under such circumstances, with a tenant bound to make the repairs, and a receiver also bound to make them, could the owners, one a lunatic and the other two residing in Europe, without any notice of the nuisance, be charged with any responsibility therefor on the theory of fault or *delictum* on their part?

The principles here involved are very important, and I have deemed a pretty thorough examination of this case quite proper. My conclusion is that this action, upon the facts now appearing, cannot be maintained, and that the judgment should be reversed and a new trial granted.

Judgment reversed.

ANDREWS, FINCH and PECKHAM, JJ., concur with EARL, J.; RUGER, Ch. J., and GRAY, J., concur with DANFORTH, J., dissenting (whose opinion is omitted).

BROWN v. WOODWORTH.

(5 Barbour, 550.—1849.)

THIS suit was commenced by writ of nuisance, and the defendants were summoned to answer *wherefore they kept up and continued a certain dam, to the nuisance of the freehold of the plaintiff*. The declaration alleged that the plaintiff was possessed of a certain piece of land, describing it by metes and bounds, through which a stream of water naturally flowed, and that the defendants wrongfully, injuriously and unjustly kept up and continued a certain dam on, upon and across said stream below the said lands of the said plaintiff, by means of which his lands were flowed; stating the injuries resulting therefrom.

It appeared on the trial of the cause, that Stephen Hill, father of the defendant Hill, was the principal in erecting the dam some 8 or 10 years before. That at that time the witness Ralph I. Gates was the owner of the premises flowed, and assisted in the erection of the dam; that in 1817, he deeded the premises to Palmer, and that he conveyed them to the plaintiff on the 8th day of October, following. It appeared that the defendant Hungerford carried on the mill, and that his co-defendants Woodworth and Hill were interested with him. The precise nature of their interest, whether as tenants for years or in fee, did not appear by the bill of exceptions. The dam, instead of being across the stream, below the plaintiff's land, abutted to and was continued upon it some rods by a slight embankment.

The defendants moved for a nonsuit upon the following grounds: 1. That there was a variance between the declaration and proof in regard to the location of the dam. 2. That the proceedings were not in a case provided for by the statute, and that Stephen Hill, senior, should have been joined in the proceedings. 3. That the defendants were not liable in this action, the dam having been erected by the consent, license and assistance of Gates, who was then the owner of the premises flowed by the dam; at least without a request to remove the dam before suit brought. Motion granted.

By the Court, MOREHOUSE, J. At common law an assize of nuisance lay only against him who levied the nuisance, or in other words the wrongdoer himself. Upon an alienation of the land wherein the nuisance was set up, the party injured was driven to his *quod permittat prosternere*. This writ was in its nature a writ of right. It lay not at common law for tenant at life, by reason whereof and that there was great delay, the statute of Wm. 2, ch. 25, gave an assize of novel disseisin for the redress of a variety of wrongs. While in use it lay by the heir of the disseisee against the disseisor, or his heir, or his alienee who levied

the nuisance, by statute Wm. 2, ch. 24. Long before we were a free people these actions had been turned into actions upon the case, and were out of use in England. They were preserved by legislation, as old remedies, until the revision of the statutes in 1830; and in that revision the writ of nuisance as a common law remedy was retained as theretofore accustomed, subject to the provisions of the revised statutes on that subject. 2 R. S. 332, § 1. To return to the assize of nuisance. We have seen that it lay only against the wrongdoer. In 13 Edw. 1, "there was not found any writ of assize of nuisance in the register but what supposed that the tenants in the assize *levaverunt*, and this cannot be said when the tenement is transferred to another, for he did not levy the nuisance, but the other only." The 24th chapter of the acts of parliament of that year provides, that the party grieved shall have a writ as well against the alienee as against him that erected it. It was held that that statute extends only to assize of nuisance against him who did the nuisance and his alienee. 2 Lutw. 1588. It does not extend to the alienee of the alienee. It seems by the statute that the action shall be brought against him that did the tort and the tertenants after the alienation. Fitz. Natura Brevium, 124, H. 290, in the note Viner's Ab. Nuisance, 34. On the 12th of March, 1787, the legislature of this state, in an act for giving further remedy and regulating the process and proceedings in assizes and other actions, enacted the provisions in the act of Ed. 1, above referred to. Laws of N. Y. vol. 2, 103, J. & V. ed. 1789. Section 5 of the chapter is as follows: "That in cases of nuisance, the plaintiff shall not go without remedy because the land is transferred to another; and further, that when the writ is granted against him or her who hath levied or shall levy the nuisance, the writ shall be made as hath been heretofore used, in the following form: A. B. hath complained to us, that C. D. unjustly and without judgment, hath erected (or made or levied) a house (or a wall, sink, pond, or whatever other thing it may be), to the nuisance of his freehold. And if such things so levied, erected, or made, be aliened from one to another, the writ shall be thus: A. B. hath complained to us that C. D. and E. F. have *erected*." This enactment, in precisely the same words, will be found in the revisions of our laws down to and including the revision of 1813. See also 2 R. S. 332, § 3. Writs of nuisance were, by statute, returnable and to be determined in the nature of assizes, either at the supreme court, or the Circuit Court in the county where the nuisance happened. The common law remedies which I have referred to, and which were thus secured by statute, had never been resorted to in this state. An action on the case, or a bill in equity, commended by their simplicity and familiarity to the bar and bench, were the only remedies used in cases of private nuisance. The last revision of our statutes yielded to the wishes of the legislature in abolishing all the real actions known to the common law, not enumerated

and retained in ch. 5 of the 3d part of that revision. That by writ of nuisance was among the favored, from an impression "that it might be made very useful because it was, and is, a part of the judgment, *that the nuisance be abated*. The proceedings in the old writ were simplified, in the service of the writ, in proceedings on default, and in the mode of trial, dispensing with the view of the nuisance by the jury. The judgment of the ancient law was retained. The spectacle of the sheriff, with his *posse comitatus*, conquering the perverseness of a defendant, who had rather pay his ill-natured neighbor six cents a year consequential damages, with costs, than voluntarily sacrifice thousands in abating a dam, has not yet been exhibited. The revised statute made no change as to parties, and enacts in language not susceptible of misconstruction, that in case of a transfer of the land to another, the party by whom the nuisance was erected, and he to whom it was transferred, *shall both* be named as defendants in the writ. 2 R. S. 332, § 2. Assize lies for acts of misfeasance, but for acts of nonfeasance an action on the case lies. It does not lie for a laches of my doing what I ought to do. It can only be brought by the tenant of the freehold, and shall be brought against *tenant of the frank tenement*. Viner's Ab. Nuisance. The writ and the counts in this case concur in complaining of a continuance of the nuisance. It is true, that every continuance of a nuisance, so far as an action for damages is concerned, is held to be a fresh one, and it is upon this assumption, that he who raised a dam, and his alienee continuing it, are allowed to be charged jointly, as having unjustly raised it, and in an action on the case, the plaintiff may declare both ways, for erecting and continuing, or for continuing only, and the latter is sufficient election. The party by whom the nuisance was erected is defendant, and if he has transferred the land to another, then he by whom the nuisance was erected, and he to whom it was transferred, *shall both* be named as defendants in the writ. There is no room for judicial doubt or criticism, as to the sense in which the legislature used the word *shall* in this statute. There is neither precedent nor opinion to be found in the books, from the time of Edward I. to the present day, countenancing the assumption, that the legislature meant to give a mere discretionary power, and not to impose a positive duty, by the use of the term *shall*, in the statute in question. The remedy is retained as *heretofore accustomed*. I have shown that it did not lie against any but the very wrongdoer himself, who levied or did the nuisance, at common law, and that the statute gave a new writ when the lands were aliened, against the wrongdoer and alienee, upon a complaint, that both had levied or raised the nuisance. Without the statute there is no writ for such a case. Regarding the statute as remedial, I know of no rule of liberality in its construction, which would authorize the court to entirely dispense with the prescribed proceedings for the attainment of the remedy, or warrant its extension

to a case not expressly provided for. On the contrary, when I reflect upon the irreparable injuries which might be inflicted upon individuals and companies, using the waters of our country as a motive power, if this obsolete remedy should be revived and favored, and consider the ample remedies of the offended party, to abate the nuisance by his own mere act on authority, in some cases, and in all to sue for damages as continuously as its existence occasions any, I think the court should be rigid in exacting a strict compliance with all the requisites of the statute. 1 Denio, 436; 1 Barb. 65; Smith's Com. 692, § 547. The plaintiff was properly nonsuited, upon the ground that such a case as his was unknown to the common law, and was not authorized by statute. The variance was between matter of description in the count and the proof. The allegation was, that the dam continued was below the plaintiff's land; the proof was, that it was adjoining and on the plaintiff's land. The tests of the materiality of variances introduced by the code in chap. 6 of tit. 6, and the provisions for amendments, by the party and the court, or the total disregard of them by the latter, have no application to this case. The counsel citing it on the argument had overlooked § 390. By express provision the act was not to affect proceedings provided for by title 4 of chapter 5 of part 3 of the revised statutes. The variance was therefore fatal. 1 Denio, 181; 3 id. 356; 2 Barn. & Ald. 363; 2 Barn. & Cress. 910.

The general rule as to license is laid down in *Shepherd's Touchstone*, 231. It is, "that license, or liberty, cannot be created and annexed to an estate of inheritance or freehold, without deed." In *Monk v. Buller*, Cro. Jac. 574, it was held that a license by a commoner must be by deed. 2 Saund. 323, 328. Many cases will be found considered in *Hawkins v. Shippam*, 5 B. & C. 221; *Perry v. Fitzhowe*, 8 Adol. & Ellis, 575. The license in this case is claimed, not against the person granting it, if any was granted, but a subsequent owner in fee as running with the land, and binding the inheritance; not by the person to whom it was granted, but by his grantees. It is a claim of an interest in the land, and a freehold interest by way of easement in the lands flowed, which could only pass by deed. 2 Barb. Ch. Rep. 230; 2 R. S. 135, § 6. In an assize of nuisance the party goes for acts of commission, and the person who committed them would not be entitled to notice to reform the nuisance, before suit brought; for the injured party might abate the nuisance without notice and without an appeal to a court of justice.

New trial denied.

ABATEMENT.**JONES v. WILLIAMS.**

(11 Meeson & Welsby, 176.—1843.)

PARKE, B. A rule was obtained in this case, by Mr. Erle, for judgment *non obstante veredicto* on the fourth plea found for the defendant, and argued a few days ago. This plea, to an action of trespass *quare clausum fregit*, stated, that the defendant, before and at the said time when &c., was possessed of a dwelling house, near the *locus in quo*, and dwelt therein; and that the plaintiff, before and at &c., *injuriously and wrongfully permitted and suffered* large quantities of dirt, filth, manure, compost, and refuse, to be, *remain*, and *accumulate* on the *locus in quo*, by reason whereof divers noxious, offensive, and unwholesome smells, &c., came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass, by entering in order to abate the nuisance, and in so doing damaging the wall, and digging up the soil.

The question for us to decide is, whether this plea is bad after verdict; and we are of opinion that it is.

The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrong-doer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another, and he omitted to remove it; or whether he was under an obligation, by prescriptive usage or otherwise, to cleanse the place where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstance would have supported the plea; and if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but, if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, or showing that the continuance was of such a description as not to require one.

It is clear, that if the plaintiff himself was the original wrong-doer, by placing the filth upon the *locus in quo*, it might be removed by the party injured, without any notice to the plaintiff; and so, possibly if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* afterwards, the authorities are in favor of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands.

We do not rely on the decision in *The Earl of Lonsdale v. Nelson*,

2 Barn. & C. 302, as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's *dictum* is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's Case*, 5 Coke, 101a, shows that an assize of *quod permittat prosternere* would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench, on the argument, the judges of that court agreed that the nuisance might be abated, without suit, in the hands of the feoffee; that is, as it should seem, with notice; for in Jenkins's Sixth Century, case 57 (no doubt referring to *Penruddock's Case*), the law is thus stated:—A. builds a house, so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a *quod permittat* for it, *before he makes a request* to C. to abate it, for C. is a stranger to the wrong: it would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrongdoer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created.

LORD ABINGER, C. B., observed, that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the court concurred.

Rule absolute.

BROWN v. PERKINS.

(12 Gray, 89.—1858.)

ACTION of tort for breaking and entering plaintiff's shop, and carrying away and destroying a barrel of vinegar and other goods. The answer denied this, and alleged that the building was kept for the sale of intoxicating liquors and so was a common nuisance (St. 1855, chaps. 405 and 215, § 37), and that a large number of persons assembled to abate the same and destroyed only spirituous liquor unlawfully kept for sale.

The court, among other things, instructed the jury as follows: "1st. That intoxicating liquors kept for sale, with the vessels containing them, and articles used in the sale being declared by law to be a common nuisance, it is lawful for any person to destroy them, by way of abatement of a common nuisance, and that it is the exercise of a common and lawful right. 2d. That if kept in such a shop, not a dwelling-house, locked or otherwise closed, it is justifiable to use force, but no more force than is necessary to reach the liquor and vessels, if it cannot be come at otherwise. 3d. That if the combination or conspiracy of a large number of persons extends no further than to take and destroy intoxicating liquor and the vessels, and to use no unnecessary force, the fact that such combination is entered into by a large number of persons to act together, in doing that and no more, would not take away the justification they would have, if done by one or a few of them."

SHAW, CH. J. This is an action for breaking and entering the plaintiff's shop, and destroying various articles of property.

The defendants, denying the facts, and putting the plaintiff to proof, insist that if it is proved that they were chargeable with the breaking and entering, it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and so was declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the proof shows that it was done; that the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they entered for such purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

A great many points were raised in the report, and argued, upon which the court have not passed; they are all passed over now for the purpose of coming to the main points which are decisive of the case.

The judge who sat at the trial stated that he ruled the law and directed

the jury as stated in the report, subject to the opinion of the whole court, and when many other points were raised, he stated that it might be more convenient to report the whole case, so far as controverted points were presented, for the consideration of the whole court; and this, it was understood, was assented to by counsel

Passing over all questions as to plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion, after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not, of themselves, a common nuisance, but the act of keeping them for sale by statute creates a nuisance; and the only mode in which they can be lawfully destroyed is the one directed by statute, for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. Therefore it is not lawful for any person to destroy them by way of abatement of a common nuisance, and a *fortiori* not lawful to use force for that purpose.

2. It is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never entrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgment of his peers or the law of the land; and no person can be twice punished for the same offense. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4. The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water-course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the Commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a private nuisance, did not expressly mark this distinction; but we think, upon the author-

ity of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law. *Lonsdale v. Nelson*, 2 B. & C. 311, 312, and 3 D. & R. 566, 567; *Mayor &c. of Colchester v. Brooke*, 7 Ad. & El. N. R. 376, 377; *Gray v. Ayres*, 7 Dana, 375; *State v. Paul*, 5 R. I. 185.

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such a use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children or servants of any person do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside and a

New trial had.

STATE V. WHITE.

(18 Rhode Island, 473.—1894.)

TILLINGHAST, J. This is an indictment against the defendants, charging an assault on one Samuel E. Almy, with intent to kill and murder.

At the trial of the case in the court of common pleas the defendants were found guilty of an assault with a dangerous weapon, and they now petition for a new trial on the ground that the verdict is against the evidence, and that the presiding justice erred in his rulings of law and in his instructions to the jury.

* * * * *

Briefly summarized, then, the evidence submitted shows that the defendants were lawfully on a public highway, going to the beach, to collect White's property, the seaweed which was there; that said Almy had illegally obstructed the highway by maintaining the gate across the same, which was a public nuisance, and which specially damnified the defendant White; that Almy refused to allow the gate to be opened, and aggressively defended the same by holding it to prevent it from

being opened, and attacking the vehicle and the oxen of the defendants, while the latter were striving to force their way through; and that during or immediately after the removal of said obstruction in the manner aforesaid, a personal encounter ensued between the defendants and Almy in which the latter received the injuries complained of, and also in which, according to defendants' testimony, White was knocked down and rendered insensible by Almy, and Ash was also beaten by him with a stick.

The first question which arises in view of this state of facts is whether the presiding justice erred in his refusal to instruct the jury as requested by the defendants' counsel: (1) "That if the jury finds that the defendants and their cart were on this highway intending to take the most direct track to the beach and salt water for their seaweed, and that Almy interrupted them, Almy, and not they, was the aggressor;" (2) "that if the jury find that these parties were attacked while upon a public highway of the state, Almy, and not they, was the aggressor."

The answer to this question depends upon the correctness of the defendants' contention as to their legal right to remove said obstruction by force, while the complainant was present and actively defending the same. If they had this right, then Almy, and not they, was the aggressor, and said request to charge should have been granted; otherwise not.

We think it is well settled, notwithstanding some decisions and *dicta* to the contrary, that a private person may not, of his own motion, abate a strictly public nuisance. *Dimes v. Petley*, 15 Q. B. 276; *Brown v. Perkins*, 12 Gray, 89; *Griffith v. McCullum*, 46 Barb. 561; Wood, Nuis. §§ 729-737, and cases cited; *Bowden v. Lewis*, 13 R. I. 189. It is also equally well settled that a private person may, of his own motion, abate a public nuisance, where the existence thereof is a source of special injury to him, provided he can do so without a breach of the peace. 3 Bl. Comm. 5; 16 Am. & Eng. Enc. Law, 990-994, and cases cited; *State v. Keeran*, 5 R. I. 497, 510; *Clark v. Ice Co.*, 24 Mich. 508; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Rung v. Shoneberger*, 2 Watts, 23; 4 Wait, Act. & Def. 778, and cases cited; *Day v. Day*, 4 Md. 262, 270; *State v. Flannagan*, 67 Ind. 140. In Cooley on Torts (2d Ed. pp. 48, 49) the law is well stated as follows: "The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured by its continuance; if it is a public nuisance, he only may abate it who suffers a special grievance, not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommoded by it may remove it; but unless he has occasion to make use of the highway, he must leave the public injury to be redressed by the public authorities. It is the existence of an emergency which justifies the interference of the individual. In permitting this redress, certain

restrictions are imposed to prevent abuse or unnecessary injury. One of these is that the right must not be exercised to the prejudice of the public peace. Therefore, if the abatement is resisted, it becomes necessary to seek in the courts the ordinary legal remedies." This being the law, the question which naturally arises is, did the defendants commit a breach of the peace in the abatement of the nuisance in question? We think they did. . . .

[After considering the authorities, the court continues.] They went with the evident intention of breaking open the gate by overcoming whatever force Almy might oppose to them. They were armed with a pitchfork, a hoe, and a pistol. They used violent and profane language in a public highway, in the presence of at least six persons. They backed their team against the gate while Almy and Hussey were on the opposite side thereof, the latter holding the gate, and the former striving to prevent the cart from going through. They provoked a quarrel, and brought on a personal encounter. In short, they went to the place in question prepared for, and evidently expecting, a fight in connection with the abatement of the nuisance, and they were not disappointed. They took the law into their own hands, and in doing so they acted at their peril. That Almy was in the wrong, and liable to indictment for maintaining the nuisance, as well as for the use of violence against the defendants, may be assumed; but this fact did not justify the defendants in committing a breach of the peace in abating it, the public peace being of more importance than the assertion of the defendants' right to use said highway. We are therefore of the opinion that the defendants, and not Almy, were the aggressors in the affray referred to, and hence that the presiding justice properly refused to charge as requested.

* * * * *

Petition for new trial denied and dismissed.

SAME: EFFECT UPON ACTION.

GLEASON V. GARY

(Connecticut, 418.—1822.)

ACTION on the case for obstructing a water-course, the uninterrupted use of which the plaintiff had enjoyed for forty-seven years, and into which it appeared that the defendant had thrown great quantities of stone, subsequently removed by the plaintiff. The judge instructed the jury, that if the defendant obstructed the water as claimed by the

plaintiff, and the plaintiff thereafter removed the obstructions, and abated the nuisance, as by law he had right to do; and since such abatement, no damage had accrued to the plaintiff from such obstruction down to the date of the writ; the jury must find a verdict for the defendant. They so found, and the plaintiff moved for a new trial, on the ground of a misdirection.

HOSMER, CH. J. The only question in the case, is, whether the abatement of the nuisance by the plaintiff, for the damages resulting from which anterior to the removal, he has brought his suit, has extinguished his right of action. The judge expressed an opinion in the affirmative; but it was manifestly incorrect.

In *Baten's case*, 9 Co. Rep. 54, it is said, "that there are two ways to redress a nuisance; one by action, and in that he shall recover damages and have judgment that the nuisance shall be removed; or the party grieved may enter, and abate the nuisance himself; but then he shall not have an action, nor recover damages; for in an assize of nuisance, or *quod permittat prosternere*, it is a good plea, that the plaintiff himself has abated the nuisance; for in an assize or *quod permittat*, he shall have judgment of two things, sc. to have the nuisance abated, and to recover damages, and he has disabled himself, by his own act, to have judgment for one of them; and therefore the action doth not lie." 3 Bla. Comm. 220. This reasoning conclusively shows, that an assize of nuisance, of *quod permittat prosternere*, cannot be sustained, after the plaintiff has abated the nuisance, and disabled himself from the pursuit of those particular remedies; but it has no bearing on the pursuit of redress, by action on the case, for damages only. The objection in *Baten's case*, after the abatement of a nuisance, was not founded on the cause of action being taken away, by complete remedy; for the damages sustained were recoverable, and ought to be satisfied. But, the party, by his own act, had incurred a disability of maintaining certain modes of redress, the judgment in which must be for damages, and likewise for the prostration of the nuisance. In *Kendrick v. Bartland*, 2 Mod. Rep. 253, the precise point before the court was decided, and an action on the case, sustained. "The end," say the court, "of a *quod permittat*, or an assize, was to abate the nuisance; but the end of the action on the case, is to recover damages." Nothing has happened to extinguish the plaintiff's cause of action, or to raise an impediment in the way of his recovery.

The other judges were of the same opinion.

*New trial to be granted.*¹

¹ See also *Tate v. Parrish*, 7 Monr. 325; *Crump v. Lambert*, 13 L. T. (N. S.) 133, affirming S. C., L. R. 3 Eq. 409; *Pierce v. Dart*, 7 Cowen, 609. *Contra*, *Griffith v. McCullom*, 46 Barb. 561.

NEGLIGENCE ¹

DUTY TO EXERCISE CARE.

SWEENEY v. OLD COLONY & NEWPORT RAILROAD CO.

(10 Allen, 368.—1865.)

ACTION to recover damages for personal injuries.

At the trial it appeared that the plaintiff was injured while crossing defendants' tracks on a private way leading from South to Federal street, in Boston; and that the defendants not only did not object to such crossing, so far as it did not interfere with their cars, but kept a flagman there, partly to protect their own property, and partly to protect the public. On the day of the accident, as an engine and car were coming from defendants' depot, the plaintiff, with a horse and wagon, came down South street from the same direction. There was evidence tending to show that the flagman signalled him to stop, and he obeyed; that he afterwards signalled to go ahead, and the plaintiff attempted to cross, looking straight ahead; that he saw the car approaching, and jumped from his wagon, was knocked down and run over by the car. The

¹ "Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrongdoer. A horse straying in a field falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. (Story on Bl. §§ 19, 22; *Gardner v. Heartt*, 3 Denio, 336.) Of the latter, a trespasser may complain, although he cannot be allowed to do so in regard to the former." Beardsley, C. J., in *Tonawanda Railroad Co. v. Munger*, 5 Denio, 255, 266.

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion." *Baltimore & Potomac R. R. Co. v. Jones*, 95 U. S. 439.

evidence being contradictory as to the care exercised by the plaintiff and the flagman, the court ruled that, though the defendants were not bound to keep a flagman at that crossing, yet, since they did keep one there, they would be responsible to the plaintiff, provided he used due care, if he was induced to cross by the signal of the flagman, and if that signal was negligently made at a time when it was unsafe to cross. Verdict for plaintiff. The case was reserved for the consideration of the whole court.

BIGELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line, which marks the limit of the defendants' liability for damages caused by the acts of their agents, the case at bar falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by

customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby v. Hill*, 4 C. B. (N. S.) 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the

owner's residence, ran against the materials and sustained damage, for which the owner was held liable. COCKBURN, C. J., says: "The proprietors of the soil held out an allurements whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto." In *Chapman v. Rothwell*, El., Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trapdoor to be open without sufficient light or proper safeguards, in a passage way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by KEATING, J., in *Hounsell v. Smyth*, 7 C. B. (N. S.) 738. In the last named case the decision is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger and not on the owner. The same distinction is stated in *Barnes v. Ward*, 9 C. B. 392; *Hardcastle v. South Yorkshire Railway, &c.*, 4 Hurlst & Norm. 67; and *Binks v. South Yorkshire Railway, &c.*, 32 Law Jour. (N. S.) Q. B. 26. In the last cited case the language of BLACKBURN, J., is peculiarly applicable to the case at bar. He says, "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Balch v. Smith*, 7 Hurlst. & Norm. 741, and *Scott v. London Docks Co.*, 11 Law Times, (N. S.) 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot in any just view of the evidence be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place of crossing was situated between two streets in the city, (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted

and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner, as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the court, that the defendants induced the plaintiffs to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants

induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fullness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

*Judgment on the verdict.*¹

WALKER V. POTOMAC, ETC., R. Co.

(105 Virginia, 226.—1906.)

BUCHANAN, J. This action was instituted by the plaintiff in error against the defendant company to recover damages for the death of his intestate, caused by the alleged negligence of the defendant.

The evidence shows that the defendant has a turntable on its own premises near Orange Court House, located about 220 feet from its

¹ After the above decision was rendered, the verdict was set aside, by Chapman, J., as against the evidence.

station or depot; about 360 feet from the public road which runs from the depot to the village of Orange Court House; close by a mill-road, which is not public; fifty or sixty feet from what is known as the horse-show grounds; about 340 feet from any inhabited house; and in an open and unoccupied field; that boys were in the habit of playing ball on the horse-show grounds, between which and the railway land there was no fence; that boys frequently rode on the turntable, and had once been seen riding on it by the depot agent; that some years before the accident two boys had been injured in playing with the turntable, which was of the ordinary kind in use, and was neither locked nor fastened; that on the Sunday evening of the accident the plaintiff's intestate, who was a little over twelve years of age, with two other boys of about the same age, was pushing the turntable around the track preparing to jump on it, and as he did so one of his feet was caught between the rails and mashed, causing lockjaw, from the effects of which he died.

Upon the trial of the cause there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

The only question involved in this writ of error is whether or not, under the facts of the case, which are not disputed, the defendant was guilty of negligence in leaving the turntable in the place where it was, on its own premises, unfenced and unfastened.

The general rule is that a landowner does not owe to a trespasser (and the same is true of a bare licensee) the duty of having his land in a safe condition for a trespasser to enter upon. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes, and he takes upon himself the risks of the condition of the land, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant being present could have prevented the injury by the exercise of ordinary care after discovering the danger. *Norfolk & Western Ry. Co. v. Wood*, 99 Va. 156, 158-59; *Hortenstein's Admr. v. Va.-Carolina Ry. Co.*, 102 Va. 914, 918; *Williamson v. Southern Ry. Co.*, 104 Va. 146; Bishop on Non-Contract Law, sec. 845; Cooley on Torts(2d ed.) 791-94.

It is not denied, as we understand the counsel for the plaintiff, that such is the common law doctrine as to adult trespassers and bare licensees; but his contention is that, under certain circumstances, such as are disclosed by this record, it is not the rule as applied to children. To sustain that contention he relies upon the case of *Sioux City R. Co. v. Stout*, 17 Wall. 657, and the cases which follow it.

While these cases, which are known as "The Turntable Cases," fully sustain the plaintiff's contention, there is a remarkable conflict of authority upon the subject. The doctrine announced in the Stout Case has been discussed in numerous cases by the appellate courts of many of the States of this country, with the result that there are many au-

thorities sustaining the doctrine in its broadest sense; while many utterly repudiate it, and others give it a qualified recognition and practically limit it to railroad turntable cases. A question or problem which has given rise to such a wide divergence of opinion is not of easy solution.

As this is the first case involving this precise question which has ever come to this court, so far as the reported decisions show, we are at liberty to follow that line of decisions which, in our judgment, is more nearly in accord with settled principles of law and is sustained by the better reason.

In order for the plaintiff to recover in this case it must appear that the defendant company owed his intestate some duty which it failed to discharge; for where there is no duty there can be no negligence. *N. & W. Ry. Co. v. Wood, supra; Hortenstein's Admr. v. Va. Car. Ry. Co., supra; Carson Lime Co. v. Rutherford*, 102 Va. 252.

As before stated, the common law imposes no duty upon a landowner to use care to keep his premises in such condition that trespassers and bare licensees going thereon may not be injured. This is unquestionably the rule as to adults, and the weight of authority as it seems to us, shows that it is the rule as to children.

The cases cited in the cases of *Sioux City R. Co. v. Stout* to sustain the opposite view, do not, as it seems to us, do so. Those cases come within other rules, or within well defined exceptions to the general rule that a landowner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. This is clearly shown, we think, by the supreme Judicial Court of Massachusetts, in the case of *Daniels v. N. Y. & N. E. R. Co.*, 154 Mass. 349, and by Judge PECKHAM (now of the Supreme Court of the United States), in delivering the opinion of the Court of Appeals of New York, in *Walsh v. Fitchburg, &c., R. Co.*, 145 N. Y. 301.

The conclusion reached in those cases is fully sustained by the following cases (and many more might be cited), which are all "Turntable Cases," or cases in which the doctrine of those cases was involved. *Frost v. Eastern R. Co.*, 64 N. H. 220; *Delaware, &c., Ry. Co. v. Reich* (N. J.); *Uttermohlen v. Boggs, Run &c., Co.*, 50 W. Va. 457; *Ryan v. Towar*, 128 Mich. 463; *Paolino v. McKendall*, 24 R. I. 432; *Dobbins v. Missouri &c., Ry. Co.*, 91 Texas, 60; *Savannah, &c., Ry. Co. v. Beavers*, 113 Ga. 398.

The same conclusion was reached by this court in *Clark v. City of Richmond*, 83 Va. 355. The city had made an excavation upon the land of another, into which a child of six years fell and was injured. In denying the child the right to recover in that case it was said that where the excavation is so near the highway that a traveller, by making a false step, or being affected by sudden giddiness, might be thrown into the excavation and injured, there would be a liability. "But if, in order

to reach the place of danger, the party injured must become a trespasser upon the premises of another, the case will be different, for in such a case there is no breach of duty from which the liability to respond in damages can result."

But in some of the "Turntable Cases" the right to recover is maintained upon the doctrine of constructive invitation—that is, that if a person is allured, or tempted by some act of a railroad company to enter upon its lands, he is not a trespasser; and it is held that leaving a turntable unfastened or unguarded, under circumstances similar to those disclosed by this record, is such an act.

One of the cases cited and relied on to sustain this contention is the case of *Bird v. Holbrook*, 4 Bing. 628. The defendant in that case, for the protection of his property, some of which had been stolen, set a spring gun, without notice, in a walled garden some distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the landowner was liable. The express object in setting the spring gun was to inflict injury—to do an intentional wrong.

Another case relied on is that of *Townsend v. Wathen*, 9 East, 277. That was a case where a landowner had set traps on his premises near the highway, and baited them with decaying meat, so that its scent would extend not only to the highway, but beyond to the private premises of the plaintiff, whose dogs, scenting the meat, came upon the defendant's premises and were caught in a trap and thereby killed. It was held in that case that a man had no right to set traps of a dangerous description in a situation to invite, and for the very purpose of inviting, his neighbor's dogs, as it would compel them by their instinct to come into his traps. The act of the defendant in that case was not in the prosecution of his legitimate business, but as the court said was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his premises.

The gravamen of both these actions was the wrongful intention of the defendants. To liken the case of a railroad company erecting a turntable on its own premises for its own necessary purposes in the regular conduct of its business, with no desire or intention to injure anyone, to the case of a landowner setting spring guns or traps on his land for the express purpose of doing an unlawful or malicious injury, is, as it seems to us, to lose sight of the difference between negligence and intentional wrongdoing. *Walsh v. Fitchburg, &c., R. Co. supra*; *Dobbins v. Mo., Kansas & Tex. Ry. Co.* (Texas) 41 S. W. 62.

"The viciousness of the reasoning," said the Court of Appeals of New Jersey, in the case of *Delaware, &c., R. Co. v. Reich, supra*, in discussing this question, "which fixes liability upon the landowner because the child is attracted, lies in the assumption that what operates as a

temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As said by Mr. Justice HOLMES (now a member of the Supreme Court of the United States), in *Holbrook v. Aldrich*, 168 Mass. 16, 'Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it'—or hold parties bound to contemplate infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen."

No landowner supposes for a moment that by growing fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises.

This doctrine of constructive invitation is not sustained, as it seems to us, by the English cases cited to sustain it, and has been utterly rejected by the highest courts of New Hampshire, Massachusetts, New York, New Jersey, Rhode Island, Michigan and West Virginia. In several other States it is limited in its operation to turntable cases. See *Frost v. Eastern, &c., Ry. Co.*, *supra*; *Daniels v. N. Y. & N. E. R. Co.*, *supra*; *Walsh v. Fitchburg, &c., R. Co.*, *supra*; *Delaware, &c., Ry. Co. v. Reich*, *supra*; *Ryan v. Towar*, *supra*; *Paolino v. McKendall*, *supra*; *Dobbins v. Missouri, &c., Ry. Co.* *supra*; *Savannah, &c., Ry. Co. v. Beavers*, *supra*.

The maxim, "*Sic utere tuo ut alienum non laedas*," has been quoted in some of the "Turntable Cases," and relied on as affording a decisive reason, or ground, for establishing a duty upon the railway company, and as *per se* justifying a recovery against it. There may be more, but there is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property.

In *Deane v. Clayton*, 7 Taunton 489, GIBBS, J., said: "I know it is a rule of law that I must occupy my own so as to do no harm to others, but it is their legal rights only that I am bound not to disturb; subject to this qualification I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of (their) wrongs that I am bound to regard."

In *Knight v. Albert*, 6 Pa. St. 472, where an effort was made to apply

the maxim to sustain an action by the owner of cattle which had trespassed upon the lands of another and had been injured by reason of the unsafe condition of the property, Chief Justice GIBSON said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not, uninvited, interfere with it or enter upon it. . . . If it were not so, a proprietor could not sink a well, or a saw pit, dig a ditch or millrace, or open a stone quarry, or a manhole on his land, except at the risk of being made responsible for consequential damage from it which would be a most unreasonable requirement." *Ryan v. Towar, supra*. See article by Judge SMITH on Landowners' Liability to Children, etc., 11 Harvard Law Review 349-373, 434, 448, in which there is a valuable discussion of that whole subject.

Upon neither of the grounds relied on do we think that the common law makes it the duty of a landowner to have his premises in a safe condition for the uninvited entry of adults or children, nor to take affirmative measures to keep them off of his premises or to protect them after entry; and this view is strengthened by the fact that so many of the courts which have adopted the doctrine of the "Turntable Cases" restrict it as far as possible to turntables, and refuse to follow it to its natural and logical consequences. For if it be a rule of the common law that a landowner, who, in the reasonable and lawful use of his property, makes changes thereon which have the double effect of attracting young children to the land and at the same time exposing them to serious danger, is guilty of negligence unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply not only to railroad companies and their turntables, but to all landowners who in the use of their land maintain upon it dangerous machinery, or conditions which present a like attractiveness and temptation to children. The common law applies alike to all landowners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law, which had its origin before there were either railroads or turntables, applies only to railroad companies in the use of their lands, upon which they have dangerous machinery. While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create a new principle or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of the needed laws is the province of the Legislature, and not of the judicial department of the government. *Connelly v. Western Tel. Co.*, 100 Va. 59. The Legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances, and leave untouched the common law rights of the ordinary landed proprietor.

The Court of Appeals of New Jersey, in refusing to follow the doctrine of the "Turntable Cases," said, that the doctrine would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them, which presented a like attractiveness and furnished a like temptation to children. "He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water; . . . he who leaves his mowing machine, or dangerous agricultural implement, in his fields; he who maintains a pond in which boys may swim in summer, and on which they may skate in winter; would seem to be amenable to this rule of duty. Climbing, playing at work, swimming and skating, are attractions almost irresistible to children, and every landowner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them the 'Turntable Cases,' if correct, would charge the owner . . . with the duty of taking care to preserve young children thus tempted on his farm from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, causes strong suspicions of the correctness of the doctrine, and leads us to question it." *Delaware, &c., R. Co. v. Reich, supra; Turess v. N. Y., &c., R. Co., 61 N. J. L. 314; Uttermohlen v. Boggs Run, &c., Co., supra.*

The Supreme Court of Minnesota, which was one of the first to give its adherence to the turntable doctrine (*Kiffe v. Milwaukee, &c., Ry. Co., 21 Minn. 207*), in the subsequent case of *Stendal v. Boyd, 73 Minn. 53*, through its Chief Justice, said: "The doctrine of the 'Turntable Cases' is an exception to the rules of non-liability of a landowner for accidents from visible causes to trespassers on his premises, and if the exception is to be extended to this case (a dangerous excavation filled with water on a city lot, in which a little boy had been drowned), then the rule of non-liability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child-proof."

We will conclude this opinion with the following extract from the very able opinion of Judge DENMAN, speaking for the Supreme Court of Texas (another of the states which had followed the turntable doctrine), in the case of *Dobbins v. Missouri, &c., Ry. Co., 41 S. W. 62*, as expressing our views: "The difficulty," he said, "about those cases ('Turntable Cases') is, that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In those cases the courts yielding to the hardships of individual instances where owners have been guilty of moral, though not legal wrongs, in permitting attractive and dangerous turntables and water holes to

remain unguarded on their premises in populous cities, to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law, and assumed legislative functions, imposing a duty where none before existed. As a police measure the law-making power may, and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, etc., situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal or civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed the court may properly enforce it or allow damages for its breach, but not before."

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

DuBois v. Decker

(130 New York, 325.—1891.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff.

HAIGHT, J. This action was brought to recover damages of the defendant, a physician and surgeon, for alleged malpractice suffered by the plaintiff whilst undergoing treatment as a patient.

On the 1st day of December, 1889, the plaintiff undertook to jump on to an engine of the Ulster and Delaware Railroad, in the city of Kingston, and in doing so slipped, and his left foot was caught by the tender, and a portion thereof crushed. Being destitute, he was taken to the city almshouse, where he was treated by the defendant, who was one of the city physicians having the care of the patients therein, and who was employed for that purpose. Thereafter, and on the 10th day of December, he amputated the plaintiff's leg above the ankle joint, and six or seven days thereafter, gangrene having set in, he again amputated the leg at the knee joint. After the second amputation the leg did not properly heal, but became a running sore, and at the time of the trial the bone protruded some three or four inches.

Evidence was given upon the trial from which the jury might find that the bones of the foot were so crushed that immediate amputation of the injured portions was necessary, and that the appearance of gangrene was in consequence of the delay of ten days in the operation; and that in the second operation the defendant neglected to save flap enough

to cover the end of the limb and bone, and that the subsequent protrusion of the bone was owing to this neglect.

The question of the defendant's liability consequently became one for the jury. We are aware that he claimed to have waited ten days before operating, for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient care, skill and knowledge, and he should have known the probable consequences that would follow from the crushing of the bonds and tissues of the foot.

In submitting the case to the jury, the defendant asked the court to charge that "if the plaintiff did not obey the defendant's instructions and this contributed to an aggravation of the injury, the plaintiff cannot recover." The court declined to charge in the form in which the request was put, and an exception was taken by the defendant.

It appears from the testimony of the defendant that after the second amputation he dressed the stump and put the plaintiff in position by elevating the limb so as to prevent hemorrhage and too much pressure upon the arteries; that the plaintiff did not keep in the position in which he was placed and got his leg to bleeding, and that he presumed that this bleeding interfered with the healing of the limb. It also appears that some time after the second amputation the plaintiff refused and neglected to take the medicine that was left for him by the defendant, and that subsequently, after the defendant had ordered him to be removed to another room so as to avoid liability of contracting erysipelas from a patient that had been brought to the almshouse afflicted with that disease, he left and went away.

Whilst the removing of the limb from the position in which it was placed may have produced the bleeding and thus to some extent impeded the healing, and his going away at the time that he did may also have further aggravated the difficulty, these facts would only tend to mitigate the damages and would not relieve the defendant from the consequence of previous neglect or unskillful treatment. As to the prescription we are not told what it was or what it was for, and the jury was, therefore, unable to determine whether or not the condition of the patient would have been materially changed by its use.

The request to charge, as we have seen, was to the effect that if the plaintiff did not obey the instructions, and this contributed in aggravation of the injury, the plaintiff cannot recover. This was too broad if the jury found that the defendant was guilty of malpractice prior to the disobedience complained of.

In the case of *Carpenter v. Blake*, 75 N. Y. 12, the court was requested to charge that if the plaintiff was guilty of any negligence in the manage-

ment of the arm through or without the fault of the attending surgeon after the defendant ceased to have charge of the case, and such negligence contributed in any material degree to produce the present bad condition of the arm, the defendant was not responsible. This request was refused, and it was held properly for the reason that the request was too broad; that if there had been subsequent negligence, the cause of action for defendant's negligence would simply go in mitigation of damages.

In the case of *McCandless v. McWha*, 22 Pa. St. 261-272, LEWIS, J., in delivering the opinion of the court, says: "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but if it be painful, injurious and unskillful, he is not bound to peril his health and perhaps his life by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper and adapted to the end in view. It is incumbent on the surgeon to satisfy the jury on this point, and in doing so he has the right to call to his aid the science and experience of his professional brethren. It will not do to cover his own want of skill by raising a mist out of the refractory disposition of the patient."

The defendant moved to dismiss the complaint upon the ground that it failed to show a contract relation between the parties whereby the defendant was employed to attend the plaintiff, and that no facts were alleged showing it to be the duty of the defendant to treat him in a skillful manner. This motion being denied, the defendant asked the court to charge that as the defendant treated the plaintiff gratuitously, he is liable, if at all, only for gross negligence; which was refused.

It has been held that the fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill and diligence. *McCandless v. McWha*, 22 Pa. St. 261-269; *McNevins v. Lowe*, 40 Ill. 209; *Gladwell v. Steggall*, 5 Bing. N. C. 733.

But we do not deem it necessary to consider or determine this question for it appears that the plaintiff's services were not gratuitously rendered. He was employed by the city as one of the physicians to attend and treat the patients that should be sent to the almshouse. The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill.

Exceptions were taken to the admission and rejection of evidence. We have examined them and find none that require a new trial.

The judgment should be affirmed, with costs. All concur, except PARKER, J., not sitting. *Judgment affirmed.*¹

¹ "If a party has taken in hand the conduct of anything requiring special skill and

CURTIN v. SOMERSET

(140 Pennsylvania, 70.—1891.)

PAXSON, C. J. The defendant, Philip H. Somerset, entered into a contract with the Sea Isle City Hotel Company, for the erection of a hotel building, at Sea Isle City, according to certain plans and specifications. The building was completed, and accepted by the hotel company in the presence of their architect and the chairman of the building committee. Subsequently, at an entertainment given at the hotel by the proprietor or lessee, a crowd of persons, some twenty or more, having collected on the porch, a girder, which in part supported it, gave way, the porch fell, and by reason thereof the plaintiff (a guest at the hotel) was injured. He brought this suit in the court below against the contractor, to recover damages for the injury he thus sustained, with the result of a verdict in his favor for \$4,000.

Upon the trial, the defendant asked the court below to instruct the jury that "if Somerset, the defendant, was the contractor for the erection of the hotel in question, for the Sea Isle City Hotel Company, the owner, and after completion delivered possession of it to the said Sea Isle City Hotel Company on June 30, 1888, which company accepted it, and if the accident in question happened after June 30, 1888, and while said owner or his lessee was in possession, then the plaintiff is not entitled to recover against the defendant." See first assignment. This point was refused, and it fairly presents the important question in the case.

The contention of the plaintiff is that the accident was caused by the defective construction of the porch; that it was not according to the plans and specifications called for by the contract; that timbers inferior in size and quality to those called for by the plans were used;

knowledge, we require of him a competent measure of the skill and knowledge usually found in persons who undertake such matters. And this is hardly an addition to the general rule; for a man of common sense knows wherein he is competent and wherein not, and does not take on himself things in which he is incompetent. If a man will drive a carriage, he is bound to have the ordinary competence of a coachman; if he will handle a ship, of a seaman; if he will treat a wound, of a surgeon; if he will lay bricks, of a bricklayer; and so in every case that can be put. Whoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft, and is answerable accordingly. If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril. As the Romans put it, *imperita culpa adnumeratur*. . . . An exception to this principle appears to be admissible in one uncommon but possible kind of circumstances, namely where in emergency, and to avoid imminent risk, the conduct of something generally entrusted to skilled persons is taken by an unskilled person." Pollock on Torts, 7 Ed., 27.

that these defects were not observable after the building was completed, and, in point of fact, were unknown to the company when it accepted the building from the contractor.

We must assume these allegations as substantially found by the jury, and the question arises, what is the responsibility of the contractor under such circumstances? That he would be responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications, may be conceded. There was a contractual relation between them, and for breach of a contract, not known to and approved by the company, he would be liable. Is he also liable for an injury to a third person not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty,—the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that because A. is not responsible for an accident B. or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this State. The true rule, which we think applicable to it, may be found in Wharton on Negligence, 2d ed. § 438. It is as follows:—"There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. . . . Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and, after he has finished his work and it has been accepted by the city, a traveller is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveller in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveller's hurt and the contractor's negligence. The traveller reposed no confidence in the contractor, nor did the contractor accept

any confidence from the traveller. The traveller, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveller intervened the city an independent, responsible agent, breaking the causal connection."

In § 438, the same learned author refers to the case of a contract with the postmaster-general to furnish certain roadworthy carriages; and after the delivery of the carriages the plaintiff is injured in using one of them, by reason of the carriage having been defectively built. "No doubt," says Mr. Wharton, "had the carriage been built for the plaintiff, he could have recovered from the contractor. But there is no confidence exchanged between him and the contractor; and between them breaking the causal connection, is the postmaster-general acting independently, forming a distinct legal center of responsibilities and duties." This rule is distinctly recognized in *Winterbottom v. Wright*, 10 M. & W. 115.

. . . . *Francis v. Cockrell*, L. R. 5 Q. B. 501; *Heaven v. Pender*, 11 Q. B. 503; *Collis v. Selden*, L. R. 3 C. P. 495; and other English cases, recognize the doctrine that in such instances there is no duty owing from the contractor to the public. As was said by Martin, B., in *Francis v. Cockrell*, *supra*: "The law of England looks at proximate liabilities as far as possible, and endeavors to confine liabilities to the persons immediately concerned." In *Losee v. Clute*, 51 N. Y. 494, it was held that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction; and if, after delivery to and acceptance by the purchaser, and while in use by him an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer.

We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In *Godley v. Hagerty*, 20 Pa. St. 387, the builder was the owner, and he was properly held responsible for an inherent weakness in the building by which an accident occurred. In *Carson v. Godley*, 26 Pa. 111, the warehouse was erected under the personal superintendence of the owner, and having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building, in consequence of its insufficiency for the purpose for which it was erected and leased. In *Thomas v. Winchester*, 6 N. Y. 397, the court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, to be liable to all persons, who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labelled to avoid

accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer.

We need not pursue the subject further. We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason. The consequences of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, a piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine or his steamships shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned. We are of the opinion that the defendant's first point should have been affirmed. . . .

* * * * *

SOUTHERN RAILWAY CO. & ANO. V. GRIZZLE.

(124 Georgia, 735.—1906.)

ACTION to recover for the death of plaintiff's husband killed, as alleged, through the negligence of the company and one O'Neal, who, as engineer of the train, neglected to ring bell, sound whistle and check the speed of his train, as he approached a highway crossing, according to the requirements of the blow-post law. O'Neal demurred, but the demurrer was overruled, and he excepted.

COBB, P. J. 1. An agent is not ordinarily liable to third persons for mere nonfeasance. *Kimbrough v. Boswell*, 119 Ga. 201. An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and

as such he is responsible for any injury he may cause. When he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. See 2-Clark & Skyles on Agency, 1297 *et seq.* Misfeasance may involve also to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. Mechem on Ag. § 572. As was said by GRAY, C. J., in *Osborne v. Morgan*, 130 Mass. 102: "If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." In that case the agent was held liable by the fall of a tackle-block and chains from an iron rail suspended from the ceiling of a room, which fell for the reason that the agent had suffered them to remain in such a manner and so unprotected that they fell upon and injured the plaintiff. In *Bell v. Josselyn*, 3 Gray, 309, METCALF, J., said: "Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do. . . . The defendant's omission to examine the state of the pipes, . . . before causing the water to be let on, was a malfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff."

In the present case the failure of the engineer to comply with the requirements of the blow-post law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken in behalf

of the principal to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance. This view is strengthened by the fact that the blow-post law renders the engineer indictable for failure to comply with its provisions. The allegations of the petition were therefore sufficient to charge O'Neal with a positive tort, for which the plaintiff would be entitled to bring her action against him.

* * * * *

Judgment affirmed.

LANE V. COX

(L. R. 1 Queen's Bench, 415.—1897.)

THE defendant was owner of a house which he let unfurnished to a weekly tenant. There were no covenants to repair on the part of either the landlord or the tenant. The plaintiff was a workman, who came upon the premises at the request of the tenant for the purpose of moving some furniture. While so employed the plaintiff was injured owing to the defective state of the staircase in the house. There was evidence that at the time the house was let the staircase was in an unsafe condition. The plaintiff brought this action to recover damages for the injuries he had sustained, and it was tried before the Lord Chief Justice, who entered a nonsuit.

The plaintiff appealed.

LORD ESHER, M. R. . . . There was no contractual relation between the plaintiff and the defendant, and it was not like the case of a person who keeps a shop to which he intends people to come. It is said, however, that the defendant was guilty of negligence which led to the accident because he let the house in a defective condition. It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner or occupier; and, if by the negligent management of his house he causes injury, in either of these cases he is liable. In this case the negligence alleged is the letting the house

in an unsafe condition. It has been held that there is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger. There was, therefore, no duty on the part of the defendant to the plaintiff, and there could be no liability for negligence, and the non-suit was right.

LOPES, L. J. . . . It is said that the claim of the plaintiff may be grounded on the negligence of the defendant. There cannot be a liability for negligence unless there is a breach of some duty; and no duty exists in this case to the tenant, and none can be alleged to strangers. The case differs entirely from those in which property is in a dangerous state by reason of which an injury happens to one of the public on a highway, or to the occupier of an adjoining house. I think the appeal should be dismissed.

RIGBY, L. J., concurred.

Appeal dismissed.

DEPUE V. FLATAU

(100 Minnesota, 299.—1907.)

BROWN, J. The facts in this somewhat unusual case are as follows: Plaintiff was a cattle buyer, and accustomed to drive through the country in the pursuit of his business, buying cattle, hides, and furs from the farmers. On the evening of January 23, 1905, about 5 or 5.30 o'clock, after having been out a day or two in the country, he called at the house of defendants, about seven miles from Madelia, where he resided. His object was to inspect some cattle which Flatau, Sr., had for sale, and if arrangements could be made to purchase the same. It was dark at the time of his arrival, but he inspected the cattle in the barn, and suggested to defendant that, being unable to determine their value by reason of the darkness, he was not prepared to make an offer for the cattle, and requested the privilege of remaining over night, to the end that a bargain might be made understandingly in the morning. His request was not granted. Plaintiff then bought some furs from other members of defendants' family, and Flatau, Sr., invited him to remain for supper. Under this invitation plaintiff entered the house, paid for the furs, and was given supper with the family. After the evening meal, plaintiff and both defendants repaired to the sitting-room of the house, and plaintiff made preparation to depart for his home. His team had

not been unhitched from the cutter, but was tied to a hitching post near the house. The testimony from this point leaves the facts in some doubt. Plaintiff testified that soon after reaching the sitting-room he was taken with a fainting spell and fell to the floor. He remembers very little of what occurred after that, though he does recall that, after fainting, he again requested permission to remain at defendants' over night, and that his request was refused. Defendants both deny that this request was made, and testified, when called for cross-examination on the trial, that plaintiff put on his overshoes and buffalo coat unaided, and that, while adjusting a shawl about his neck, he stumbled against a partition between the dining-room and the sitting-room, but that he did not fall to the floor. Defendant Flatau, Jr., assisted him in arranging his shawl, and the evidence tends to show that he conducted him from the house out of doors, and assisted him into his cutter adjusting the robes about him and attending to other details preparatory to starting the team on its journey. Though the evidence is somewhat in doubt as to the cause of plaintiff's condition while in defendants' home, it is clear that he was seriously ill and too weak to take care of himself. He was in this condition when Flatau, Jr., assisted him into the cutter. He was unable to hold the reins to guide his team, and young Flatau threw them over his shoulders and started the team towards home, going a short distance, as he testified, for the purpose of seeing that the horses took the right road to Madelia. Plaintiff was found early next morning by the roadside, about three quarters of a mile from defendants' home, nearly frozen to death. He had been taken with another fainting spell soon after leaving defendants' premises, and had fallen from his cutter, where he remained the entire night. He was discovered by a passing farmer, taken to his home, and revived. The result of his experience necessitated the amputation of several of his fingers, and he was otherwise physically injured and his health impaired. Plaintiff thereafter brought this action against defendants, father and son, on the theory that his injuries were occasioned solely by their negligent and wrongful conduct in refusing him accommodations for the night, and, knowing his weak physical condition, or at least having reasonable grounds for knowing it, by reason of which he was unable to care for himself, in sending him out unattended, to make his way to Madelia the best he could. At the conclusion of plaintiff's case, the trial court dismissed the action, on the ground that the evidence was insufficient to justify a recovery. Plaintiff appealed from an order denying a new trial.

Two questions are presented for consideration: (1) Whether, under the facts stated, defendants owed any duty to plaintiff which they negligently violated; and (2) whether the evidence is sufficient to take the case to the jury upon the question whether defendants knew, or under the circumstances disclosed ought to have known, of his weak

physical condition, and that it would endanger his life to send him home unattended.

The case is an unusual one on its facts, and "all-four" precedents are difficult to find in the books. In fact, after considerable research, we have found no case whose facts are identical with those at bar. It is insisted by defendants that they owed plaintiff no duty to entertain him during the night in question, and were not guilty of any negligent misconduct in refusing him accommodations, or in sending him home under the circumstances disclosed. Reliance is had for support of this contention upon the general rule as stated in note to *Union Pacific v. Cappier*, 69 L. R. A. 513, where it is said: "Those duties which are dictated merely by good morals or by humane considerations are not within the domain of the law. Feelings of kindness and sympathy may move the Good Samaritan to minister to the needs of the sick and wounded at the roadside, but the law imposes no such obligation; and suffering humanity has no legal complaint against those who pass by on the other side. . . . Unless, therefore, the relation existing between the sick, helpless, or injured and those who witness their distress is such that the law imposes the duty of providing the necessary relief, there is neither obligation to minister on the one hand, nor cause for legal complaint on the other." This is no doubt a correct statement of the general rule applicable to the Good Samaritan, but it by no means controls a case like that at bar.

The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.

This principle applies to varied situations arising from non-contract relations. It protects the trespasser from wanton or wilful injury. It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, though it does not embrace those sentimental or social duties often prompting human action. 21 Am. & Eng. Enc. (2d Ed.) 471; Barrows, Neg. 4. Those entering the premises of another by invitation are entitled to a higher degree of care than those who are present by mere sufferance. Barrows, Neg. 304. The rule stated is supported by a long list of authorities, both in England and this country, and is expressed in the familiar maxim,

"*Sic utere tuo*," etc. They will be found collected in the works above cited, and also in 1 Thompson, Neg. (2d Ed.) § 694. It is thus stated in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503: "The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." It applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them. A valuable note to *Union Pacific v. Cappier*, 69 L. R. A. 513, discusses at length the character of the duty and obligation of those coming into relation with sick and disabled persons, and numerous analogous cases are collected and analyzed.

In the case at bar defendants were under no contract obligation to minister to plaintiff in his distress; but humanity demanded that they do so, if they understood and appreciated his condition. And, though those acts which humanity demands are not always legal obligations, the rule to which we have adverted applied to the relation existing between these parties on this occasion and protected plaintiff from acts at their hands that would expose him to personal harm. He was not a trespasser upon their premises, but, on the contrary, was there by the express invitation of Flatau, Sr. He was taken suddenly ill while their guest, and the law, as well as humanity, required that he be not exposed in his helpless condition to the merciless elements.

The case, in its substantial facts, is not unlike that of *Cincinnati v. Marrs' Adm'x*, 27 Ky. Law 388. In that case it appears that one Marrs was found asleep in the yards of the railway company in an intoxicated condition. The yard employees discovered him, aroused him from his stupor, and ordered him off the tracks. They knew that he was intoxicated, and that he had left a train recently arrived at the station, and he appeared to them dazed and lost. About forty minutes later, while the yard employees were engaged in switching, they ran over him and killed him. He had again fallen asleep on one of the tracks. The court held the railway company liable; that, under the circumstances disclosed, it was the duty of the yard employees to see that Marrs was safely out of the yards, or, in default of that, to exercise ordinary care to avoid injuring him; and that it was reasonable to require them to anticipate his probable continued presence in the yards. The case at bar is much stronger, for here plaintiff was not intoxicated, nor a trespasser, but, on the contrary, was in defendants' house as their guest, and was there

taken suddenly ill in their presence, and, if his physical condition was known and appreciated, they must have known that to compel him to leave their home unattended would expose him to serious danger.

We understand from the record that the learned trial court held in harmony with the view of the law here expressed, but dismissed the action for the reason, as stated in the memorandum denying a new trial, that there was no evidence that either of the defendants knew, or in the exercise of ordinary care should have known, plaintiff's physical condition, or that allowing him to proceed on his journey would expose him to danger. Of course, to make the act of defendants a violation of their duty in the premises, it should appear that they knew and appreciated his serious condition. The evidence on this feature of the case is not so clear as might be desired, but a majority of the court are of opinion that it is sufficient to charge both defendants with knowledge of plaintiff's condition—at least, that the question should have been submitted to the jury.

Defendant Flatau, Sr., testified that he was in the room at all times while plaintiff was in the house and observed his demeanor, and, though he denied that plaintiff fell to the floor in a faint or otherwise, yet the fact that plaintiff was seriously ill cannot be questioned. Flatau, Jr., conducted him to his cutter, assisted him in, observed that he was incapable of holding the reins to guide his team, and for that reason threw them over his shoulders. If defendants knew and appreciated his condition, their act in sending him out to make his way to Madelia the best he could was wrongful and rendered them liable in damages. We do not wish to be understood as holding that defendants were under absolute duty to entertain plaintiff during the night. Whether they could conveniently do so does not appear. What they should or could have done in the premises can only be determined from a full view of the evidence disclosing their situation, and their facilities for communicating his condition to his friends, or near neighbors, if any there were. All these facts will enable the jury to determine whether, within the rules of negligence applicable to the case, defendants neglected any duty they owed plaintiff.

Order reversed.

STANDARD THEREFOR.

STEAMBOAT NEW WORLD V. KING

(16 Howard [U. S.], 469.—1853.)

MR. JUSTICE CURTIS delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating within the ebb and flow of the tide, a boiler flue was exploded through negligence, and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board.

It has been urged that the master had no power to impose any obligation on the steamboat by receiving a passenger without compensation.

But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is, even indirectly, beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities. *Smith on Mer. Law*, 559; *Grant v. Norway*, 10 Com. B. 688; S. C. 2 Eng. L. and Eq. 337; *Pope v. Nickerson*, 3 Story, R. 475; *Citizens Bank v. Nantucket Steamboat Co.*, 2 Story, R. 32. But different employments may and do have different usages, and consequently confer on the master different powers. And when as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion the master has power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects on the part of the master and owners and their boat, existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In the *Philadelphia and Reading Railroad Company v. Derby*, 14 How. R. 486, which was a case of gratuitous carriage of a passenger on a railroad this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may deserve the epithet of gross."

We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. In *Storer v. Gowen*, 18 Maine R. 177, the Supreme Court of Maine say: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice STORY, (*Bailments*, § 11), says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the term

gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. *Wilson v. Bratt*, 11 Meeson & Wels. 113; *Wylde v. Pickford*, 8 id. 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy et al. v. Wood*, 3 Mason, 132, and *Foster v. The Essex Bank*, 17 Mass. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See Toullier's *Droit Civil*, 6th vol. p. 239, etc.; 11th vol. p. 203, etc.; Makeldey, *Man. Du Droit Romain*, 191, etc.

But whether this term, gross negligence, be used or not, this particular case is one of gross negligence. according to the tests which have been applied to such a case.

In the first place, it is settled, that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." Story on Bailments, § 15.

It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence. Thus HEATH, J., in *Shields v. Blackburne*, 1 H. Bl. 161, says, "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery." And Lord LOUGHBOROUGH declared that an omission to use skill is gross negligence. Mr. Justice STORY, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones, between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it. And the same may be said of Mr. Justice PORTER, in *Percy v. Millandon*, 20 Martin, 75. This qualification of the rule is also recognized in *Stanton et al. v. Belle et al.*, 2 Hawks, 145.

That the proper management of the boilers and machinery of a steam-

boat requires skill, must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves. We do not hesitate therefore to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in the case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the act of July 7, 1838 (5 Stat. at Large, 306), provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer called the Wilson G. Hunt, was then about a quarter of a mile astern of the New World, and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of the Hunt says he hardly knows whether the boats were racing, but both were doing their best, and this is confirmed by the assistant pilot, who says the boats were always supposed to come down as fast as possible; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place called "the slough" the Hunt attempted to pass the New World. Fay, a passenger on board the New World, swears that on two occasions, before reaching "the slough" the Hunt, attempted to pass the New World, and failed; that to his knowledge these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that the Hunt attempted to pass the New World in "the slough" is denied by two of the respondents' witnesses, but they do not meet

the testimony of Fay, as to the two previous attempts. Haskell, another passenger, says, "about ten minutes before the explosion I was standing looking at the engine, we saw the engineer was evidently excited, by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time." The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of the New World, were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says they were not racing. The engineer says: "We have had some little strife between us and the Hunt as to who should get to Benicia first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement, that it does not appear to have been known to any other person on board either boat, that this witness and the pilot were both directly connected with and responsible for the negligence charged, and that the fact of racing is substantially sworn to by two passengers on board the New World, and by the pilot and assistant pilot of the Hunt, and is not denied by the master of the New World, we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the act of Congress has thrown on the claimants. It is possible that those managing a steamboat engaged in a race may use all that care and adopt all those precautions which the dangerous power they employ renders necessary to safety. But it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness and skill the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *prima facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried as wholly unsatisfactory. They say the boiler was allowed by the inspector to carry forty pounds to the inch, and that when the explosion occurred, they were carrying but twenty-three pounds. The principal engineer says he does not remember how much steam they had on. The master is silent on the subject and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, "doing its best." We are not convinced that she was carrying only twenty-three pounds, little more than half her allowance.

This is the only evidence by which the claimants have endeavored to encounter the presumption of negligence. In our opinion it does not

disprove it; and consequently the claimants are liable to damages, and the decree of the District Court must be affirmed.¹

(Dissenting opinion by Mr. Justice DANIEL omitted.)

ROLLING MILL CO. v. CORRIGAN.

(46 Ohio State Reports, 283.—1889.)

ACTION by an infant under fourteen years of age, by his guardian, to recover damages for personal injuries, caused, as alleged, by the negligence of the defendant. Defense, that the injuries were caused by the plaintiff's own fault. Among other things, the court charged the jury that, "it was the duty of the plaintiff to use ordinary care and prudence; just such care and prudence as a boy of his age, of ordinary care and prudence, would use under like or similar circumstances. You should take into consideration his age, the judgment and knowledge he possessed." Verdict and judgment for plaintiff. Defendant alleges error.

WILLIAMS, J. The only questions presented in this case are those arising upon the special instructions given by the Court in response to the request of the jury. These instructions, the plaintiff in error contends, are erroneous in their entirety and in detail.

1. First, it is claimed that the Court erred in the statement of the plaintiff's duty, in the opening proposition of the charge, wherein the jury were instructed that "it was the duty of the plaintiff to use ordinary care," which the Court defined to be "just such care as boys of that age, of ordinary care and prudence, would use under like circumstances," and that the jury "should take into consideration the age of the plaintiff, and the judgment and knowledge he possessed." We have found no decision of this Court upon the subject of the contributory negligence of infants, or the measure of care required of them. Elsewhere the decisions are conflicting. Each of three different rules on the subject has found judicial sanction. One rule requires of children the same standard of care, judgment, and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these extremes a third and more reasonable rule has grown into favor, and is now supported by the great weight of authority, which is, that a child is held to no greater care than is usually possessed by children of the same age. Authors and judges, however, do not always employ

¹ See also *Perkins v. N. Y. C. R. R. Co.*, 24 N. Y. 196.

the same language in giving expression to the rule. In *Beach on Contributory Negligence*, § 46, it is thus expressed: "An infant plaintiff who, on the one hand, is not so young as to escape entirely all legal accountability, and on the other hand is not so mature as to be held to the responsibility of an adult is, of course, in cases involving the question of negligence, to be held responsible for ordinary care, and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child." The decisions enforcing this rule, that children are to be held responsible only for such degree of care and prudence as may reasonably be expected of them, taking due account of their age and the particular circumstances, are very numerous. "It is well settled," says Mr. Justice HUNT in *Railroad Company v. Stout*, 17 Wall. 657, "that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. . . . The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." In *Shearman & Redfield on Negligence*, § 73, it is said to be "now settled by the overwhelming weight of authority that a child is held, as far as he is personally concerned, only to the exercise of such care and discretion as is reasonably to be expected from children of his own age." Another author says, "A child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising." *Whittaker's Smith on Neg.*, 411.

This rule appears to rest upon sound reason as well as authority. To constitute contributory negligence in any case there must be a want of ordinary care and a proximate connection between such want of care and the injury complained of; and ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use under similar circumstances. Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. Hence ordinarily prudent men reasonably expect that children will exercise only the care and prudence of children, and no greater degree of care should be required of them than is usual under the circumstances among careful and prudent persons of the class to which they belong. We think it a sound rule, therefore, that in the application of the doctrine of contributory negligence to children, in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults, and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

That portion of the charge of the Court under discussion is in substantial conformity to this conclusion. The care and prudence which a boy of the plaintiff's age of ordinary care and prudence "would use under like and similar circumstances," as expressed in the charge, is such care as "is reasonably to be expected from a boy of his age," or "which boys of his age usually exercise," as the books express it. No different effect is given to the charge of which the plaintiff in error can complain, by the direction to the jury to take into consideration the age of the boy "and the judgment and knowledge he possessed." This did not diminish the degree of care required by the previous portion of the instruction.

* * * * *

Judgment affirmed.

HASSENYER V. MICHIGAN CENT. R. R. Co.

(48 Michigan, 205.—1882.)

DEFENDANT brings error.

COOLEY, J. The plaintiff in error was sued by the administrators of Louisa Hassenyser to recover damages for the negligence of its agents and servants whereby her death was caused. The case comes up on alleged errors in the admission and rejection of evidence, and in instructions given or refused.

The decedent was killed at the crossing of the railroad with Burdick street, one of the principal streets in the village of Kalamazoo, on the 20th day of December, 1878. She was a girl 13 years of age, and was proceeding along the street with a small pail of milk in her hands. The morning was somewhat cold and stormy. As she approached the railroad track a train was passing in one direction, and its bell was being rung. From the other direction an engine was backing up several cars, and its bell was also being rung. It was by this train that the girl was struck and killed. There was a flagman at the crossing, and no negligence seems attributable to him. The brakeman on the backing train was upon the ground, walking along by its side to guard against accidents, but did not notice the girl until she had been thrown to the ground and killed. No one saw the girl when she was struck, and the place where she was lying when first seen was outside the limits of the street.

It was contended for the defense that there was no evidence of negligence on the part of the railroad agents and servants, and therefore nothing to go to the jury. It was also insisted that a clear case of negli-

gence on the part of the decedent appeared, and that upon this ground, if not upon the other, the court should have instructed the jury to return a verdict for the defendant. We do not agree that the case was so plain on either ground as to justify the court in taking it from the jury. It may be that if we were at liberty to pass upon the facts we should reach the conclusion which the defense insists upon as the only conclusion that is admissible; but we cannot say that the case is too plain upon the facts for fair minds to differ upon, and following our former decisions we agree with the trial court that the facts were properly left to the jury. *Detroit, etc. R. R. Co. v. Van Steinburg*, 17 Mich. 99; *Lake Shore, etc. R. R. Co. v. Miller*, 25 Mich. 274, 295; *Le Baron v. Joslin*, 41 Mich. 313.

Upon a supposition that the jury might find that the decedent at the time she was struck and killed was outside the limits of the highway and upon lands belonging to the railroad company, the defense requested rulings in effect that if such was the fact the decedent was in law chargeable with negligence. We do not agree that this was necessarily the case. The fact might have an important bearing, or it might not; depending on how far she was outside the street lines, and why she was there, and whether she was aware of the fact. As the street was without fences or cattle-guards at this point, it would be unreasonable to hold that at her peril she must keep herself strictly within its lines, and if no intent to leave the highway was apparent, and she was not further outside than one might inadvertently go in passing along the street and looking both ways for coming and passing trains, the fact should neither absolve the employees of the railroad company from the observation of care to prevent injury, nor charge her with fault if otherwise sufficiently vigilant.

Counsel for the plaintiff in error has been industrious in the discovery of faults in the rulings of the circuit judge, but for the most part his criticisms are too particular and technical to be accepted, or to require discussion at our hands. With a single exception we think no error was committed to the prejudice of the party now complaining. The exception is found in the instructions to the jury respecting the degree of care required of the decedent to avoid the danger to which she fell a victim. It was contended for the plaintiff below that the law did not require the same degree of care of a child as of an adult person, and the court so instructed the jury. This was unquestionably correct. *Railway Co. v. Bohn*, 27 Mich. 503. But it was also insisted that the law did not expect or require the same degree of care and prudence in a woman as in a man; and the court gave this instruction also. It is presumable, therefore, that the jury in considering whether the decedent was chargeable with contributory negligence, made not only all proper allowances on account of her immature years, but further allowance also on account of sex.

No doubt the difference in sex has much to do with the application of legal principles in many cases. Police regulations with the utmost propriety sometimes make distinctions between men and women, in the conduct required of them under the same circumstances, and the unwritten law is in some particulars more indulgent to the one sex than the other. Words and conduct which in the presence of men might be condemned for bad taste only, in the presence of women may be punishable as criminal indecency, and a crime of violence committed upon the one would be condemned less severely by public opinion and punished less severely by the law than the same crime committed upon the other. And no doubt also the law ought, under all circumstances where they become important, to make allowances for any differences existing by nature between men and women, and also for any that grow out of their different occupations, modes of life, education and experience. A woman, for example, driving a horse on a highway, may be presumed somewhat wanting in the "amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment—in short, the same degree of competency" which we may presume in a man; and the person meeting her under circumstances threatening collision should govern his own conduct with some regard to her probable deficiencies. *Daniels v. Clegg*, 28 Mich. 33, 42. In *Snow v. Provincetown*, 120 Mass. 580, a question of contributory negligence was made against a young woman who, in attempting to pass a cart in a public way, which had commenced backing towards her, accidentally fell over an embankment and was injured. The following instruction by the trial judge to indicate the degree of care required of the plaintiff, was held unexceptionable: "Care implies attention and caution, and ordinary care is such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances." This no doubt is true.

But while the authorities permit all the circumstances to be taken into the account, age and sex among the rest, in determining the degree of care to be reasonably required or looked for, no case, so far as we know, has ever laid it down as a rule of law that less care is required of a woman than of a man. Sex is certainly no excuse for negligence (*Fox v. Glastenbury*, 29 Conn. 204); and if we judge of ordinary care by the standard of what is commonly looked for and expected, we should probably agree that a woman would be likely to be more prudent, careful and particular in many positions and in the performance of many duties, than a man would. She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more cautious to avoid unknown dangers; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such

as only great strength and courage could venture to encounter. Of a given number of persons travelling by cars, several men will expose themselves to danger by jumping from the cars when they are in motion, or by standing upon the platform, where one woman would do the same; and a man driving a team would be more likely to cross in front of an advancing train than a woman would. In many such cases a woman's natural timidity and inexperience with dangers inclines her to be more cautious; and if we naturally and reasonably look for greater caution in the woman than in the man, any rule of law that demands less must be unphilosophical and unreasonable.

Suppose, for instance, that a man and woman standing together upon the platform of a moving car are accidentally thrown off and injured, could any rule of law be justified which would permit a jury to award damages to her but not to him, upon the ground that the law expected and required of him the higher degree of care? Or may the woman venture upon an unsafe bridge from which the man recoils, under the protection of such a discrimination? Or trust herself to a fractious horse expecting, if she shall chance to be injured, the tenderness of the law will excuse her with a verdict of such care as was reasonably to be expected, when it would pronounce a man foolhardy? We think not.

No person of any age or sex is chargeable with legal fault who, when placed in a position of peril, does the best that can be done under the circumstances. *Voak v. Northern Central Ry. Co.*, 75 N. Y. 320. Even this statement indicates a more rigid rule than the law will justify, for the legal requirement is only the observance of ordinary care; and while in laying down rules that are of general application, it is no doubt better to employ general terms, lest they be supposed applicable to particular classes only (*Tucker v. Henniker*, 41 N. H. 317); yet when the actor is a woman, an instruction that she is bound to observe the conduct of a woman of common and ordinary prudence, cannot be held legally erroneous because of being thus special. *Bloomington v. Perdue*, 99 Ill. 329.

Women may enter upon and follow any of the occupations of life; they may be surgeons if they will, but they cannot as such claim any privilege of exemption from the care and caution required of men. A woman may be engineer of a locomotive if she can obtain the employment, but the law will expect and require of her the same diligence to avoid mischief to others which men must observe. The rule of prudent regard for the rights of others knows nothing of sex. Neither can sex excuse anyone for the want of ordinary care when exposing one's self to known and obvious perils.

If it was apparent that the error of the judge did not mislead in this case, we might affirm the judgment. But that fact is not apparent.

No one witnessed this accident; the question of due care is involved in doubts, and the erroneous ruling may have been controlling. It follows that there must be a new trial.

The other justices concurred.

HILL v. GLENWOOD

(124 Iowa, 479.—1904.)

WEAVER, J. The plaintiff claims to have been injured upon one of the public walks in the city of Glenwood, and that such injury was occasioned by reason of the negligence of the city in the maintenance of the walk at the place of the accident, and without fault on his own part contributing thereto. From verdict and judgment in his favor for \$665, the city appeals. In this court the appellant makes no claim that the city was not negligent, but a reversal is sought on other grounds.

* * * * *

II. It was shown without dispute that plaintiff had been blind for many years, and this fact is the basis of the criticism upon the charge given to the jury. In the third paragraph of the charge, the court, defining negligence, said: "(3) Negligence is defined to be the want of ordinary care; that is, such care as an ordinarily prudent person would exercise under like circumstances. There is no precise definition of ordinary care, but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence. This rule applies alike to both parties to this action, and may be used in determining whether either was negligent." In the eighth paragraph, referring to the plaintiff's duty to exercise care for his own safety, the following language is used: "(8) It must also appear from the evidence that the plaintiff did not in any way contribute to the happening of the accident in question by any negligence on his part; that is, by his own want of ordinary care. The plaintiff, on his part, was under obligation to use ordinary care to prevent injury when passing over any sidewalk; and if he failed so to do, and his failure in any way contributed to the happening of the accident in question, then he cannot recover herein. The evidence shows without dispute that he was blind, and this fact should be considered by you in determining what ordinary care on his part would require when he was attempting to pass over one of the sidewalks of this city." Counsel for appellant do not deny that the rules here laid down would be a correct

statement of the law of negligence and contributory negligence as applied to the ordinary case of sidewalk accident, but it is urged that the conceded fact of plaintiff's blindness made it the duty of the court to say to the jury that a blind person who attempts to use the public street "must exercise a higher degree of care and caution than a person ordinarily would be expected or required to use had he full possession of his sense of sight." We cannot give this proposition our assent. It is too well established to require argument or citation of authority that the care which the city is bound to exercise in the maintenance of its streets is ordinary and reasonable care, the care which ordinarily marks the conduct of a person of average prudence and foresight. So, too, it is equally well settled that the care which a person using the street is bound to exercise on his own part to discover danger and avoid accident and injury is of precisely the same character, the ordinary and reasonable care of a person of average prudence and foresight. The streets are for the use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those possessing perfect health, strength, and vision. The law casts upon one no greater burden of care than upon the other. It is true, however, that in determining what is reasonable or ordinary care we must look to the circumstances and surroundings of each particular case. As said by us in *Graham v. Oxford*, 105 Iowa, 708: "There is no fixed rule for determining what is ordinary care applicable to all cases, but each case must be determined according to its own facts." In the case before us the plaintiff's blindness is simply one of the facts which the jury must give consideration, in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise, when burdened by such infirmity. In other words, the measures which a traveler upon the street must employ for his own protection depend upon the nature and extent of the peril to which he knows, or in the exercise of reasonable prudence ought to know, he is exposed. The greater and more imminent the risk, the more he is required to look out for and guard against injury to himself; but the care thus exercised is neither more nor less than ordinary care—the care which men of ordinary prudence and experience may reasonably be expected to exercise under like circumstances. See cases cited in 21 Am. & Eng. Enc. Law (2d Ed.), 465, note 1. In the case at bar the plaintiff was rightfully upon the street, and if he was injured by reason of the negligence of the city, and without contributory negligence on his part, he was entitled to a verdict. In determining whether he did exercise due care it was proper for the jury, as we have already indicated, to consider his blindness, and in view of that condition, and all the surrounding facts and circumstances, find whether he exercised ordinary care and prudence. If he did, he was not guilty of contributory negligence.

This view of the law seems to be fairly embodied in the instructions to which exception is taken. If the appellant believed, as it now argues, that the charge should have been more specific, and dwelt with greater emphasis upon the fact of plaintiff's blindness as an element for the consideration of the jury in finding whether he exercised reasonable care, it had the right to ask an instruction framed to meet its views in that respect. No such request was made, and the omission of the court to so amplify the charge on its own motion was not error.

* * * * *

The judgment of the district court is affirmed.

KEITH V. WORCESTER, ETC., STREET RAILWAY CO.
SAME V. INHABITANTS OF MILLBURY

(196 Massachusetts, 478.—1907.)

ACTION to recover damages for the death of plaintiff's intestate, caused by falling over an obstruction in the highway. The company had piled rails in the street near the curb and the town allowed the pile to remain there. The plaintiff's intestate was near-sighted, and could not recognize a friend at a distance of more than ten or twelve feet. She fell while stepping over the pile of rails.

At the trial, defendants requested, among others, the following instruction:—

“If the plaintiff's intestate had defective eyesight, she should take greater care in walking the street than one of good eyesight, and if she failed to use this greater degree of care, the verdict must be for the defendant.”

It was refused, and an exception taken.

In the charge to the jury, the presiding judge stated: “The plaintiff contends and has got to show by a fair preponderance of the evidence that Mrs. Keith was injured, and that she was injured while she was using . . . a degree of care that a reasonably prudent and careful person, acting prudently and carefully at the time, would have exercised and should have exercised in your judgment under all the circumstances then surrounding Mrs. Keith. That means not only external circumstances, that means not only the way in which the rails were placed, the location of the car, the necessity of action on her part, but it means also with reference to her personal peculiarities as they were shown to exist upon the stand. For instance, the conduct of a perfectly sound and healthy person may be properly regarded as one

thing, when the same conduct on the part of a diseased or infirm person might be regarded as something very different.

"What might be in your judgment perfectly reasonable and proper and careful on the part of a sound person might be regarded fairly by you as improper and careless on the part of an infirm person.

"So, in this case, while I cannot instruct you as a matter of law that Mrs. Keith, if you find her to be near-sighted, was bound to use a higher degree of care than a person not near-sighted, I have got to leave it to you as a matter of fact whether a near-sighted person would not, in order to be careful, have to exercise a higher degree of care than a person not near-sighted. In other words, I have got to leave it to you to determine whether or not a near-sighted person is using due care if he or she under the particular circumstances acts exactly as a person who was not near-sighted would have done. In other words, it is a matter of fact for you to determine whether Mrs. Keith was called on to do differently from a person in full possession of eyesight rather than as a matter of law for me to direct you in regard to it." Verdict for plaintiff in both cases.

RUGG, J. . . . The defendant asked the court to rule that if the person injured "had defective eyesight, she should take greater care in walking the street than one of good sight, and if she failed to use this greater degree of care the verdict must be for the defendant." This request properly was refused, for the reason that it directed a verdict upon a single phase of the testimony, which was not necessarily decisive. In this respect the prayer differs vitally from the one which in *Winn v. Lowell*, 1 Allen, 177, this court held should have been given. We see no reason for modifying the decision in *Winn v. Lowell*, nor is it inconsistent with subsequent cases. The standard of care established by the law is what the ordinarily prudent and cautious person would do to protect himself under given conditions. There is no higher or different standard for one who is aged, feeble, blind, halt, deaf, or otherwise impaired in capacity, than for one in perfect physical condition. It has frequently, in recent as well as earlier cases, been said, in referring to one under some impediment, that greater caution or increased circumspection may be required in view of these adverse conditions. See, for example, *Winn v. Lowell*, 1 Allen, 177; *Hall v. West End Street Railway*, 168 Mass. 461; *Hilborn v. Boston & Northern Street Railway*, 191 Mass. 14; *Vecchioni v. New York Central & Hudson River Railroad*, 191 Mass. 9; *Hawes v. Boston Elevated Railway*, 192 Mass. 324; *Hamilton v. Boston & Northern Street Railway*, 193 Mass. 324. These expressions mean nothing more than that a person so afflicted must put forth a greater degree of effort than one not acting under any disabilities, in order to attain that standard of care which the law has established for

everybody. When looked at from one standpoint, it is incorrect to say that a blind person must exercise a higher degree of care than one whose sight is perfect, but in another aspect, a blind person may be obliged to take precautions, practice vigilance and sharpen other senses, unnecessary for one of clear vision, in order to attain that degree of care which the law requires. It may depend in some slight degree upon how the description of duty begins, where the emphasis may fall at a given moment, but when the whole proposition is stated, the rights of the parties are as fully protected in the one way as in the other. It is perhaps more logical to say that the plaintiff is bound to use ordinary care, and that in passing upon what ordinary care demands, due consideration should be given to blindness or other infirmities. This was the course pursued by the Superior Court. *Neff v. Wellesley*, 148 Mass. 487. *Smith v. Wildes*, 143 Mass. 556. But it is also correct to say that in the exercise of common prudence one of defective eyesight must usually as matter of general knowledge take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions than the same person with good eyesight, in order to reach the standard established by the law for all persons alike, whether they be weak or strong, sound or deficient.

Exceptions overruled in each case.

NEGLIGENCE: LAW OR FACT.¹

FARRELL V. WATERBURY HORSE RAILROAD CO.

(60 Connecticut, 239.—1891.)

ACTION to recover damages for injuries sustained by the negligence of the defendant, and heard in damages, on a default, before COWELL, J., who made the following finding of facts:

On November 10, 1887, and for some time prior thereto the plaintiff was duly licensed to make connections with the sewers in the city of Waterbury. On that day the defendant operated a horse railroad on West Main street in that city, and its cars passed a given point every twelve minutes. In front of the premises of one Kilmartin, which was on the south side of the street, there was a double line of tracks to allow the cars to pass each other. The point of separation between these two lines commenced about one hundred and fifty feet west of Kilmartin's premises, and there was a slight rise of grade towards the east, the street running east and west. The sewer at this point is about fifteen feet below the

¹ See Erwin's Summary of Torts, 2d Ed., 199.

surface, and is located between the two lines of track. On November 9, the plaintiff commenced excavating for the purpose of connecting Kilmartin's premises with the sewer, and on November 10, by ten o'clock in the forenoon, had reached to the depth of about twelve feet below the southerly line of the defendant's track.

The manner in which the cars passed the trench was by running them up to a point ten or twelve feet distant therefrom, then detaching the horses before the car came to a stop, the horses passing around the north end of the trench. The car without coming to a stop was pushed over the trench by one of the defendant's workmen stationed there for that purpose. The plaintiff also assisted a number of times that morning in pushing the car over the trench, so that he well understood the situation.

On the 10th, a workman, whose duties were generally in the horse-car stables, was driving the horses attached to the car which caused the accident. He was a relief driver, or one whose duty it was to relieve the regular drivers whenever it became necessary. He had had considerable experience as a driver on horse-cars, and was considered a competent driver.

About ten o'clock in the forenoon, one of the plaintiff's workmen was at work in the trench under the north rail of the south line of the defendant's tracks, and the plaintiff was standing in the west side of the trench, facing east, one foot on each side of the south rail of the south line of the track, bending over, giving directions to the workmen in the trench, and for this reason his mind was not alive to the fact that a car was approaching him from the west. The driver of the defendant's car, as he came to the point where the turn-out separates, west of Kilmartin's, saw the plaintiff, and immediately called out to him to get out of the way, in a voice loud enough to have been heard by the plaintiff if his attention was not then occupied with the workmen in the trench, and was heard by the defendant's workman who was stationed at the trench for the purpose of pushing the car across it, and who was standing but a few feet from the plaintiff, which workman also called out to the plaintiff to assist in pushing the car. The plaintiff, however, did not hear the call.

Just at this moment the driver began preparations to detach the horses from the car, and for that purpose leaned over the forward rail to remove the pin which holds the coupling pin in place, but for some reason it could not be removed immediately, and the horses' heads reached within a few feet of the trench before the driver succeeded in withdrawing the pin. The car at this time was moving at the rate of three or four miles an hour from the momentum it had received, and from being pushed along by the workman whose duty it was to do so.

The driver, immediately after removing the pin and reining his horses away from the track, saw the plaintiff in close proximity to the forward

end of the car. He immediately applied the brake, but the car struck the plaintiff, knocking him down, dragging him some distance, breaking, his collar-bone, and otherwise severely injuring him.

No other notice of the approach of the car was given than is above set forth.

I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence.

The plaintiff claimed that it was not in law negligence to have his attention concentrated on the workmen in the trench for a few moments to such an extent as to divert his mind from the approach of a horse-car; also that he had the right to rely to some extent on the fact that the driver would see him, and would exercise care to avoid injuring him; also that, being lawfully on the track, the defendant owed him the duty of active vigilance to avoid injuring him; also that the driver was bound to use every reasonable effort to avoid injuring him after discovering that he was on the track exposed to injury.

On the foregoing facts I find that the plaintiff was guilty of contributory negligence, and therefore assess to him \$75 only as nominal damages. If the plaintiff was not on the above recited facts guilty of contributory negligence, his injuries were of such a character that he should recover six fold the assessed damages.

The plaintiff appealed.

TORRANCE, J. This is an action brought to recover damages for an injury caused to the plaintiff by the negligence of the defendant, in the management of one of its horse-cars, on a public highway.

The case was defaulted and heard in damages. The court below made a finding of the subordinate and evidential facts, bearing upon the question of the negligence of the defendant, and the contributory negligence of the plaintiff, and then added the following: "I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence. On the foregoing facts, however, I find that the plaintiff was guilty of contributory negligence, and therefore assess to him seventy-five dollars only, as nominal damages. If the plaintiff was not on the above recited facts guilty of contributory negligence, his injuries were of such a character that he should recover six fold the assessed damages."

Upon the trial below the plaintiff made certain claims upon matters of law, which are set forth in the record.

Four of the six reasons of appeal filed in the case are based upon the assumed fact that the court below decided these claims adversely to the plaintiff. But the record neither expressly nor by necessary implication discloses any such fact. For aught that appears, the court below took the view of the law, as expressed in these claims, which the plaintiff asked

it to take. This court upon an appeal cannot consider any error assigned in the reason of appeal, unless "it also appears upon the record that the question was distinctly raised at the trial and was decided by the court adversely to the appellant's claims." Genl. Statutes, § 1135. We cannot therefore consider the matters set forth in the last four reasons of appeal.

This leaves to be considered only the first two reasons of appeal, which are stated as follows: "(1) The court erred in deciding that the defendant on the facts found, was not negligent. (2) In deciding that the plaintiff was guilty of contributory negligence."

The plaintiff claims that the conclusions of the trial court upon the facts found, as to the negligence of the defendant, and the contributory negligence of the plaintiff, are inferences or conclusions of law, which may be reviewed by this court upon an appeal, and the defendant claims that they are inferences or conclusions of fact, which cannot be so reviewed.

If the plaintiff is right in his claim, this court can and ought to review the conclusions aforesaid. If the defendant is right, there is properly no question presented upon the record for the consideration of this court. Whether, in a given case involving the question of negligence of either the plaintiff or the defendant, the conclusion or inference of negligence drawn by the trier or triers is one which this court has or has not the power to review, is always an important and often a difficult question to determine. Its importance arises from the fact that in the former case such conclusion may upon review be either sustained or set aside by this court, while in the latter case such conclusion, whether drawn correctly or not, is, generally speaking, final and conclusive.

The difficulty of determining whether the conclusion belongs to one or the other of these classes, arises, in part at least, from the complex nature of negligence as a legal conception, and the fact that the word "negligence" is frequently used for only a part of this complex conception. "Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world), which the law attaches to those facts, the former imports the existence of certain facts (conduct), and also the consequence (liability), which the law attaches to those facts." Holmes's Common Law, p. 115. This conception involves, as its main elements, the subordinate conceptions of a duty resting upon one person respecting his conduct toward others; a violation of such duty, through heedlessness or inattention on the part of him on whom it rests; a resulting legal injury or harm to others as an effect, and the legal liability consequent thereon. Accordingly, as a legal conception, negligence has been defined as follows: "A breach of duty, unintentional, and proximately producing injury to another possessing equal rights." Smith's Law of Negligence, 1.

But neither in text-books, nor in judicial decisions, is the word "negligence" used at all times as standing for all the elements of this entire complex conception. When in courts of law, the principal question is, what was the conduct, it is customary and perhaps allowable to say that the question of negligence is one of fact to be determined by the trier; and when the question principally respects the duty or the liability to say that it is a question of law. When, therefore, in text-books, or in adjudged cases, the assertion is made that the "question of negligence" is a "question of fact" or is a "question of law," or is a "mixed question of law and of fact," no confusion of thought will result if the sense in which the word "negligence" is used in the particular instance be ascertained, and this in most cases may be readily determined from the context.

But another, and perhaps the chief cause of the difficulty of determining in a given case whether the conclusion as to negligence is one of law or of fact, arises from another source, which we will now consider.

The conception of negligence, as we have seen, involves the idea of a duty to act in a certain way towards others, and a violation of that duty by acts or conduct of a contrary nature. The duty is imposed by law, either directly by establishing specific or general rules of conduct binding upon all persons, or indirectly through legal agreements made by the parties concerned. It is with duties not arising out of contract that we are here concerned.

There is further involved in the legal conception of negligence, the existence of a test or standard of conduct with which the given conduct is to be compared and by which it is to be judged. The question whether the given conduct comes up to the standard is frequently called "the question of negligence." The result of comparing the conduct with the standard is generally spoken of as "negligence" or "the finding of negligence." Negligence, in this last sense, is always a conclusion or inference, and never a fact in the ordinary sense of that word. When the question of negligence, in the above sense, can be answered by the court, it is called a "question of law," and the answer is called an inference or conclusion of law; when it is and must be answered by a jury or other trier, it is generally called a question of fact, and the answer is called an inference or conclusion of fact. Where the law itself prescribes and defines beforehand the precise specific conduct required under given circumstances, the standard by which such conduct is to be judged is found in the law. When in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. The rules of the road, some of the rules of navigation, and the law requiring the sounding of the whistle or the ringing of the bell of a locomotive approaching a grade crossing at a specified distance therefrom, may serve as instances of this

kind. Of course if, in cases of this kind, one of the parties injures another, he is not necessarily absolved from blame by showing a compliance with the specific rule or law, for it may be that while so doing he neglected other duties which the law imposed upon him. But, when the only question is whether the ascertained conduct comes up to the standard fixed by the specific rule or law, the conclusion, inference or judgment that it does or does not, is, as we have said, one of law.

"A question of law, in the true sense, is one that can be decided by the application to the specific facts found to exist (here the conduct of some person and the circumstances under which he acted or omitted to act), of a preëxisting rule. Such a rule must contain a description of the kind of circumstances to which it is to apply, and the kind of conduct required." Terry's *Leading Principles of Anglo-Am. Law*, § 72. In such cases, as this court said in substance in *Hayden v. Allyn*, 55 Conn. 289, the evidence exhausts itself in producing the facts found. Nothing remains but for the court, in the exercise of its legal discretion, to draw the inference of liability or non-liability, and this inference or conclusion can in such cases always be reviewed by this court. Clear cases of this kind usually present no difficulty.

As applicable to most cases, however, the law has not provided specific and precise rules of conduct; it contents itself with laying down some few wide general rules. The rule that all persons must act and conduct themselves, under all circumstances, as a man of ordinary prudence would act under like circumstances, is an illustration of this class of rules or laws. This general rule of conduct is not a standard of conduct in the same sense in which a fixed rule of law is such a standard. In most cases where it must be applied, the principal controversy is over the question what would have been the conduct of a man of ordinary prudence under the circumstances? Manifestly the rule itself can furnish no answer to that question in such cases. "The rule usually propounded, to act as a reasonable and prudent man would act in the circumstances, still leaves open the question how such a man would act." Terry's *Lead. Prin. Anglo-Am. Law*, § 72.

It is also a varying standard. "In dangerous situations ordinary care means great care; the greater the danger the greater the care required; and the want of the degree of care required may amount to culpable negligence." *Knowles v. Crampton*, 55 Conn. 344.

This general rule has rightly been called "a featureless generality," but from the necessity of the case it is only the rule of law applicable in the great majority of cases involving the question of negligence. The law cannot say beforehand how the man of ordinary prudence would act, under all or any probable set of circumstances. But in cases involving the question of negligence, where this general rule of conduct is the only rule of law applicable, it may and sometimes does happen,

that the conduct under investigation is so manifestly contrary to that of a reasonably prudent man, or is so plainly and palpably like that of such a man, that the general rule itself may be applied as a matter of law, by the court, without the aid of a jury. That is, the conduct may be such that no court could hesitate or be in doubt concerning the question whether the conduct was or was not the conduct of a person of ordinary prudence under the circumstances.

The difference between the classes of cases where the court can thus apply the general rule of conduct, and those wherein it must be applied by the jury, is well illustrated in the following extract from the opinion of the Supreme Court of the United States, in the case of *Railroad Company v. Stout*, 17 Wall. 657. "If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law, that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Under the facts proven in such cases, it is a matter of sound judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used and that negligence existed, while another equally sensible and equally impartial man would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury."

The line of division between these two classes of cases is by no means a fixed and well-defined one. Close cases will occur where courts may well differ in opinion as to whether they lie on one side or on the other of the boundary line. "Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land." *Holme's Common Law*, 127.

Now the difficulty of determining whether a conclusion or inference of negligence is one of fact or one of law, as these phrases are commonly used, arises mainly in this intermediate class of cases. In such cases the law itself furnishes no certain, specific, sufficient standard of conduct, and, of necessity, leaves the trier to determine, both what the conduct

is, and whether it comes up to the standard, as such standard exists in the mind of the trier. In a case of this kind the inference or conclusion of the trier, upon the question whether the ascertained conduct does or does not come up to such standard, is, as we have said, called a question of fact, and generally speaking, it cannot be reviewed by this court. If such inference is drawn by a jury, it is final and conclusive, because their opinion of what a man of ordinary prudence would or would not do, under the circumstances, is the rule of decision in that special case. If drawn by a single trier, as it may be under our system of law, it is equally final and conclusive for the same reason.

In every such case the trier, for the time being, adopts his own opinion, limited only by the general rule, of what the man of ordinary prudence would or would not do under the circumstances, and makes such opinion the measure or standard of the conduct in question. This view of the subject is forcibly put by COOLEY, J., in the case of *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 99, wherein he says: "When the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measures the plaintiff's conduct by that. He thus makes his own opinion of what the prudent man would do a definite rule of law." And in speaking of this same matter, the Supreme Court of Pennsylvania uses the following language: "When the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, the failure to perform it is of course negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved. Such was this case. The question was not alone what the defendants had done or left undone, but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve." And later on in the same opinion, in commenting upon a case cited by the plaintiff, the court says: "Even if the court might, in that case, have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance." *McCully v. Clark*, 40 Pa. St. 399.

In his book on the Common Law, page 123, Judge HOLMES speaks

as follows: "When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men, taken from the practical part of the community, can aid its judgment."

In treating of contributory negligence, Mr. Beach, in his work on that subject, page 459, says: "In the ultimate determination of the question whether the plaintiff was guilty of contributory negligence, two separate inquiries are involved. *First*. What was ordinary care under the circumstances? *Second*. Did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care, it is not always a fixed standard. In many cases it must be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard and then measure the plaintiff's conduct by the standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law, and a matter with which the jury can properly have nothing to do." The distinction between these two classes of cases is a fundamental one and not one of mere form.

It is sometimes said that, where all the facts are found, the mode of stating the inference or conclusion of negligence will make it one of law or fact as the case may be. But this clearly is not so. No mere mode of statement, whether found in a special verdict or in a special plea, or in a finding of facts, can convert the one into the other. In *Beers v. The Housatonic R. R. Co.*, 19 Conn. 566, this court said: "If it were competent for the defendants to have availed themselves of a want of ordinary and reasonable care on the part of the plaintiff by a special plea, and that plea should allege merely the facts or circumstances on which the defendant claims that the court should have declared to the jury that such want of care was proved; or if they had been found in a special verdict by the jury; it is quite clear that such plea or verdict would be unavailable to the defendants, on the question, for the reason that the one would allege and the other would find only evidence of the fact in issue, and not the fact itself. In *Williams v. Town of Clinton*, 28 Conn. 264, this court said: "Under the pleadings the issue presented nothing but a question of fact—was there or not culpable negligence on her part? We cannot permit such a question to be taken from the jury, the legal and constitutional tribunal, by the defendant's specially reciting the evidence adduced on the trial and claiming that the court shall instruct them as to its legal effect. Such a course would speedily

put an end to all jury trials." In *Fiske v. Forsythe Dyeing Co.*, 57 Conn. 119, this court said: "The only error assigned in this case is that the court below held that 'upon the facts found, the defendants were guilty of negligence in leaving their horses unhitched and unattended, in the manner described.' The finding of the court states all the facts with great particularity. . . . But the question of negligence cannot thus be made a question of law."

In the following cases the findings of facts were substantially similar in form to the finding of facts in the case at bar, yet this court held, and rightly, that it had no power to review the conclusion as to negligence. *Daniels v. Town of Saybrook*, 34 Conn. 377; *Congdon v. City of Norwich*, 37 id. 414; *Young v. City of New Haven*, 39 id. 435; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 id. 284; *Davis v. Town of Guilford*, 55 id. 356.

On the other hand, where special findings of fact were made, and from those facts the trial court formally drew the conclusion as to negligence, this court, notwithstanding the form of the finding, held the conclusions to be conclusions of law and reviewed them. *Beardsley v. City of Hartford*, 50 Conn. 529; *Nolan v. N. Y., N. H. & H. R. R. Co.*, 53 id. 461; *Bailey v. Hartford & Conn. R. R. Co.*, 56 id. 444; *Dyson v. N. Y. & N. E. R. R. Co.*, 57 id. 9; *Gallagher v. N. Y. & N. E. R. R. Co.*, id. 442.

It is frequently supposed or assumed that it makes some difference in this matter whether the case is tried to the jury or to the court, but this is not so. Whether the trier is one man or twelve men makes no difference. If the case is such that the trier and not the law must determine whether the conduct in question is, or is not, that of the prudent man, the conclusion of the single trier upon this point is just as binding and final as that of twelve men.

In *Shelton v. Hoadley*, 15 Conn. 535, this court held that where an issue of fact is closed to the court instead of to the jury, the conclusion of the court cannot be reviewed upon a bill of exceptions, which sets out all the facts, any more than the verdict of a jury could be in like circumstances. And in *Brady v. Barnes*, 42 Conn. 512, it is said: "When an issue of fact is closed and tried by the Superior Court, this court will not, upon evidence reported, assume the responsibility of finding by inference therefrom a fact which that court could not find. The principles and the reasons which protect the sovereignty of juries over facts, when issues are closed to them, underlie this right of auditors and committees in chancery; for they are but statutory juries finding facts by forms of procedure peculiar to themselves." So also in *Stannard v. Sperry*, 56 Conn. 546, it is said: "Under our system, whenever the court, or a committee of its appointment, finds a fact, such finding is beyond revision or correction equally with the verdict of a jury, if there be no illegality in the mode of proceeding and no intentional wrong done. Errors of judgment as to the value of property must stand uncorrected.

This is equally true of the finding of a committee appointed to hear and find in place of and for the court. If its finding of facts is to be reviewed in every case by the court, its hearing becomes a useless expenditure of labor and money."

It may be said that this view of the subject leaves the parties at the mercy of the trier. A like objection, taken in the case last above cited, was thus answered in the opinion: "The defendant suggests that if this be so he is at the mercy of the committee as to the value of his part. But this fact does not vitiate the proceeding. That every person shall be at the mercy of some tribunal, both as to law and fact, is the only reason for the existence of a judicial system."

The distinction in question, then, being in general a fundamental and important distinction, the question remains whether any general rule exists, the application of which will determine in every case with certainty whether the inference as to negligence to be drawn from ascertained facts is one of fact or of law in the sense explained. Perhaps no such general rule has been or can be formulated. At any rate we know of none, and we do not intend in the present case to lay down any such general rule. But cases involving the distinction in question have been frequently before the courts; they have been decided upon principles which have been, to some extent formulated into working rules; and these rules can be applied with reasonable certainty in most cases that arise in actual practice. In his work on Torts, p. 670, Judge COOLEY states such a rule as follows: "The proper conclusion seems to be this: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute." In the case of *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, *supra*, Judge COOLEY stated the rule as follows: "It is a mistake to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences must either be certain or uncontrovertible, or they cannot be decided by the court." Wharton says: "The true position is this: Negligence is always a logical inference to be drawn by the jury from all the circumstances of the case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of a jury would be set aside by

the court, then it is the duty of the court to negative the inference. In all other cases the question is for the jury, subject to such advice as may be given by the court as to the force of the inference." Wharton on Negligence, § 420.

The rule as laid down by Judge COOLEY is substantially like the one adopted by the Supreme Court of the United States in the case of *Railroad Co. v. Stout*, *supra*. The rule is thus stated in Terry, *Anglô-Amer. Law*, § 72: "The question, was the specific conduct of the specific person in the specific circumstances reasonable or not, must usually remain as a question which is really one of fact. When the reasonableness or unreasonableness of the conduct is very plain, the court will decide it. When it seems to the court fairly to admit of doubt, it will be handed over to the jury."

Mr. Beach, in his work on Contributory Negligence, p. 454, states the rule as follows: "When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law." In *Ochsenbein v. Sharpley*, 85 N. Y. 214, the court stated the rule thus: "When the facts are undisputed and do not admit of different or contrary inferences, the question is one of law for the court." This also substantially appears to be the rule in Ohio and California. *Railroad Co. v. Crawford*, 24 Ohio St. 631; *McKeever v. Railroad Co.*, 59 Cal. 294.

It is perhaps unnecessary to say that, in making the foregoing citations from text-writers and decisions, we do not necessarily adopt or approve of all their conclusions, or the rule precisely as stated by them; but we think some of the principles stated, upon which the rules are or profess to be based, will furnish a practical guide for the solution of the question we are considering, in cases like the one at bar. Manifestly this frequently recurring question ought to be decided upon principle, so far as it is possible to do so.

We think an examination of the cases from our own reports heretofore cited, and of others therefrom that might be cited, involving the question of negligence will show that this court in such decisions has applied principles which, in most cases occurring in practice, will solve the question under consideration without much difficulty. From such an examination we think it will appear that, in cases involving the question of negligence, where the general rule of conduct is alone applicable, where the facts found are of such a nature that the trier must, as it were, put himself in the place of the parties, and must exercise a sound discretion based upon his experience, not only upon the question what did the parties do or omit under the circumstances, but upon the further question, what would a prudent, reasonable man have done under those circumstances, and especially where the facts and circumstances are of

such a nature that honest, fair-minded, capable men might come to different conclusions upon the latter question, the inference or conclusion of negligence is one to be drawn by the trier and not by the court as matter of law. Such an inference or conclusion will, speaking generally, be treated by this court as one of fact, which will not be reviewed where the facts have been properly found, unless the court can see from the record that in drawing such inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them under the circumstances, or in some other respect violated some rule or principle of law.

Of course we do not here mean to say that this court cannot review such a conclusion upon an appeal from a verdict against evidence, or that it may or may not do so upon a reservation or other proceeding of a like nature. We only mean to say that, in cases where it is the province of the trier to draw the inference of negligence, and no error of law in the sense explained is apparent on the record, error cannot be predicated of the mere act of the trier in drawing what is supposed to be an incorrect or wrong inference from facts properly found. We think these principles can be applied to the case at bar, and that they are decisive of it.

The principal facts are correctly found. They are somewhat numerous, and the question of the negligence of either party is complicated with questions as to the conduct of others, and with the special facts and circumstances of the case of which the conduct forms a part. Under the facts found the only rule applicable was the general rule of conduct. The facts and circumstances are, we think, clearly of such a nature that a trier must of necessity measure the prudence of the parties' conduct by a standard of behavior which he himself adopts for that case, based upon his opinion of the manner in which a man of ordinary prudence would act under the same circumstances. The problem involved in such an inquiry can only be solved by the trier placing himself in the position of the parties, and, in the light of his experience of human affairs, examining all the facts and circumstances as they appeared to them at the time. Furthermore, we think the facts found are of such a nature that men equally honest and impartial might, and probably would, draw from them different and opposite inferences as to whether due care was or was not exercised by each party under the circumstances.

It is not apparent upon the record that the court, in arriving at the conclusions as to negligence in the case at bar, imposed upon either party the performance of any duty which the law did not impose, nor that it did not require of them the performance of any duty which the law required; nor that in any other respect it violated any rule or principle of law.

For these reasons we think the case at bar comes within the class of cases where the conclusions of the trier, both as to negligence and con-

tributory negligence, are regarded as conclusions of fact which this court cannot review.

There is no error apparent upon the record.

In this opinion ANDREWS, C. J., LOOMIS and SEYMOUR, JJ., concurred. (Concurring opinion of CARPENTER, J., omitted.)

BURDEN OF PROOF.

CLAFLIN v. MEYER

(75 New York, 268.—1878.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the plaintiff, in an action against the defendant, a warehouseman, for alleged neglect and refusal to return goods entrusted to him. The answer alleged that the goods were stolen without fault on the part of the defendant.

HAND, J. The counsel for the respondents is correct in his position that the question of burden of proof is the material one upon this appeal. For the evidence is such that if it were incumbent upon the defendant to prove himself free from all negligence causing or attending upon the burglary and not merely to leave the case as consistent with due care as with the want of it, it is clear that the judgment, so far as it adjudges his liability for the goods, must be affirmed, as we cannot say that such proof of a conclusive character was given. But the law, as to the burden of proof is pretty well settled to the contrary. Upon its appearing that the goods were lost by a burglary committed upon the defendants' warehouse, it was for the plaintiffs to establish affirmatively that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the warehouseman.

The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of Sutherland, J., in *Schmidt v. Blood*, where "there is a total default in delivering or accounting for the goods" (9 Wend. 268), this is to be treated as *prima facie* evidence of negligence. *Fairfax v. N. Y. C. and H. R. R. Co.*, 67 N. Y. 11; *Steers v. Liverpool Steamship Co.*, 57 id. 1; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184. This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts

and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. *Lamb v. Camden and Amboy R. R. Co.*, 46 N. Y. 271, and cases there cited; *Schmidt v. Blood*, 9 Wend. 268; *Platt v. Hibbard*, 7 Cow. 500, note. GROVER, J., in 46 N. Y. (*supra*), says in delivering the opinion of the court, the question is "whether the defendant was bound to go further (*i. e.* than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs to maintain the action to prove that the fire causing the loss resulted from such negligence." And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction and that this was contrary to the law and erroneous. So SUTHERLAND, J., in 9 Wend. (*supra*), in the case of a warehouseman, says the *onus* of showing the negligence "seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods." And he cites a note of Judge COWEN to his report of *Platt v. Hibbard*, 7 Cow. 500, in which that very learned author says, criticising and questioning a charge of the circuit judge, "the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use and trover will lie (*Anonymous*, 2 Salk. 655), but when he has shown a loss or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff."

It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real "*shifting*" of the burden of proof. The warehouseman, in the absence of bad faith is only liable for negligence. The plaintiff must in *all cases*, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal

to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from the defendants' warehouse by a burglarious entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary.

Examining the case under this rule of law we find that there was no proof tending to show when the warehouse was entered, whether in the night or day time. It was, it seems, during a large portion of every twenty-four hours in the custody of the government janitors. It does not appear nor is it found whether access to the warehouse was gained through the scuttle or roof or by the ordinary entrances, whether the thieves got in by stealth and broke *out* through the roof or broke *in* through the roof. The evidence was clear that access to the roof was gained from an adjoining tenement-house by means of a burglar's ladder, and a blank brick wall rising some twenty or twenty-five feet above the roof of the tenement-house was scaled by means of this ladder; that the goods were removed from the third story of the warehouse where they were stored, the packages being carefully replaced so as to delay observation and discovery, and the marks removed from the goods in an upper room of the tenement-house, hired probably by the thieves for the purpose.

The plaintiffs rested their case upon the pleadings without proving any demand or refusal, admitting a "robbery," but not attempting to show any negligence, in the defendant.

The motion for dismissal of the complaint then made by the defendant on the ground that no negligence had been shown, that there was no evidence or refusal to deliver, and the burden was still upon the plaintiffs, should I think have been granted; and its denial may perhaps explain the subsequent finding by the referees. But if, from the evidence afterwards given on the part of the defendant himself, his negligence appeared, that finding could not now perhaps be disturbed, although it may have proceeded upon a false theory as to the burden of proof.

The respondent's counsel insists that this evidence discloses defects in the construction of the scuttle and the roof and that upon this fact want of due care can be predicated; but all the testimony concurred that the scuttle was as secure and as securely fastened as in any warehouses of that class, was as well built as any wooden scuttle in the city, that no grating upon the coping to obstruct a passage on to the roof

from a neighboring building was ever known to be put upon any warehouse, and one witness, a government officer who stated that he had seen nearly all the bonded warehouses in New York, testified that the scuttle was as strong as on any warehouse he ever saw. Another witness, also a government officer, said that it compared favorably with scuttles of other warehouses as to strength and safety. These statements are without any contradiction. It is true the police officer Field, called as a witness by the defendant, stated upon cross-examination that some warehouses had an inner grating, that many had not, that the principal warehouses had them, that this grating was more protection than the scuttle, but he did not explain what this grating was, how long used, how constructed, or whether ever applied to a United States bonded warehouse of this class. A question to this witness as to how this scuttle compared in strength and safety with other warehouse scuttles was excluded on the objection of the plaintiffs, but he stated that it was a good strong wooden scuttle and the fastenings good. He was positive that the thieves broke out from the inside and he was equally positive that the strength of scuttle fastenings was of no importance when burglars were once upon a roof as they could go through the roof itself easier than through a scuttle.

The evidence of this witness was not in my opinion sufficient upon which to base a finding "of want of care which an ordinarily prudent man would under the circumstances have exercised in relation to the protection and safe keeping of his own property." And on the whole we do not think, taking all the testimony together, that there was sufficient evidence of the fact of negligence. In the language of Maule, J., (13 C. B. 916), "when we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury, that the fact sought to be proved is established."

The theory upon which the case was tried by the plaintiffs absolved them from affirmative proof upon this point and it may well be that upon another trial much fuller and more satisfactory testimony may be produced as to the care ordinarily used and proper to be used in the construction of the roofs and fastenings of warehouses of this sort, but that given by the defendant upon this trial did not in our opinion convict him of negligence.

I have so far left out of view a feature of this case which has caused us a good deal of embarrassment. I refer to the inspection of the warehouse and its roof and scuttle by the referees in the presence of counsel, and the statement in their report that their findings are based upon the proofs *and* "such view."

If the intention of the parties was to submit themselves to the decision of the referees absolutely, irrespective of the evidence, these would become arbitrators, and their decision an arbitration, and the

arrangement would be a discontinuance of the action. *Larkin v. Robbins*, 2 Wend. 505; *Merritt v. Thompson*, 27 N. Y. 225; *Jordan v. Hyatt*, 3 Barb. 278. We cannot suppose that such was the intention of the parties or hold it to be fairly the consequence of their conduct. If the inspection of the premises meant anything more than that by it the referees might better understand the evidence (the adjournment of the reference to the warehouse and the examination of a witness upon the spot would favor this view of it), and was a submission to them of additional ocular evidence of facts to be considered in the decision, this evidence to influence the fate of the case upon appeal should appear in some way before this court. The defendant having moved for a non-suit and having excepted to the finding of negligence as wholly unauthorized by the evidence and there being none produced by the plaintiffs, it would seem that they, to sustain the finding by any evidence produced by the defendant, must be able to show it to us *in the case*. If this consists in what was seen at the warehouse by the referees it should have been detailed and spread out in the case. As the record now stands we must treat it as if it had no existence and pass upon the questions as if the only evidence was that appearing in the appeal book.

The result at which we have arrived renders it unnecessary to consider any of the exceptions to the exclusion of evidence; and as to the measure of damages, new facts developed upon another trial with regard to the payment by the plaintiffs of the duties upon the goods or their ascertained liability or non-liability for them may very probably end all controversy upon this point. The plaintiffs, in case they are entitled to recover, should of course be limited to an indemnity for their loss and should use reasonable exertions to diminish such loss. *Dillon v. Anderson*, 43 N. Y. 231. Whether their loss necessarily includes the duties payable upon the goods if or when they should withdraw them from the warehouse, we are not called upon at present to decide.

The judgment must be reversed and new trial ordered, with costs to abide the event.

All concur, except MILLER and EARL, JJ., absent at argument.

Judgment reversed.

NEGLIGENCE AND DAMAGE MUST CONCUR.

BRUNSDEN v. HUMPHREY

(L. R. 14 Queen's Bench Division, 141.—1884.)

PLAINTIFF formerly brought action against this defendant for damage to his cab caused by the negligence of the defendant's driver. That was settled and the action discontinued. The present action was brought for injuries to the person of the plaintiff caused by the same negligence of the same driver. Held that the former action was not a bar, Lord COLERIDGE, C. J., dissenting.

BOWEN, L. J. . . . In the present instance, as the defendant himself was not driving but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence, for which in the eye of the law the master or employer is responsible. Now what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or movable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or juridical writers, of the terms "*injuria*" and "*damnum*," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says Parke, B., in *Embrey v. Owen*, 6 Ex. 353, at 368, "is not indispensable, as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says LITTLEDALE, J., in *Williams v.*

Morland, 2 B. & C. 916, "there must be temporal loss or damage accruing from the wrongful act of another in order to entitle a party to maintain an action on the case"; see *Fay v. Prentice*, 1 C. B. 835, per MAULE, J.

This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the Court below and from the great authority of the present Chief Justice of England. According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not framed with reference to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in *one* sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant.¹

* * * * *

SULLIVAN V. OLD COLONY STREET RAILWAY

(200 Massachusetts, 303.—1908.)

PLAINTIFF alleged that he was a passenger in a car of the defendant, that the car was derailed at a certain point through the negligence of the defendant, and that he was jolted and injured thereby. He so testified at the trial, but was contradicted by witnesses for the defendant.

At the close of the evidence plaintiff requested, among others, the following rule:—

"1. Upon all the evidence the plaintiff is entitled to recover on the first count."

¹ Opinions by Brett, M. R., and Lord Coleridge, C. J., omitted.

The judge refused.

The judge instructed the jury, in part, as follows:—

“The only matters, then, of damages for you to consider are these: First, what was the effect upon the plaintiff of the jolts when the car was derailed? To what extent did they injure the plaintiff?”

Plaintiff excepted. Verdict for defendant.

SHELDON, J. No question was made at the trial but that the defendant was liable for any injury done to the plaintiff by reason of its car having left the track. But if no injury was caused by this to the plaintiff, if he suffered no damage whatever from the defendant's negligence, then he would not be entitled to recover. Although there has been negligence in the performance of a legal duty, yet it is only those who have suffered damage therefrom that may maintain an action therefor. *Heaven v. Pender*, 11 Qu. B. D. 503, 507; *Farrell v. Waterbury Horse Railroad*, 60 Conn. 239, 246; *Salmon v. Delaware, Lackawanna & Western Railroad*, 19 Vroom, 5, 11. 2 Cooley on Torts (3d ed.), 791; Wharton on Negligence (2d ed.), sect. 3. In cases of negligence, there is no such invasion of rights as to entitle plaintiff to recover at least nominal damages, as in *Hooten v. Barnard*, 137 Mass. 36, and *McAneany v. Jewett*, 10 Allen, 151. Accordingly, the first and second of the plaintiff's requests for rulings could not have been given, and the rulings made were all that the plaintiff was entitled to.

* * * * *

Exceptions overruled.

RES IPSA LOQUITUR.

VOLKMAR V. THE MANHATTAN RAILWAY CO.

(134 New York, 418.—1892.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the defendant entered upon a verdict directed by the court.

HAIGHT, J. This action was brought to recover damages for a personal injury.

On the 24th of June, 1885, the plaintiff was driving along Sixth avenue, in the city of New York, in a wagon, going up town under the defendant's elevated railroad structure. When near Thirty-ninth street an iron plate

or clip with a part of a broken bolt fell from the structure, striking him upon the shoulder, causing the injury for which this action was brought.

It appears that the bolt was about fourteen inches long; that it passed through the guard rail of the defendant's road, the stringer upon which it rested and an iron plate or clip underneath, which was held in place by a nut upon the end of the bolt; that the bolt was broken about two inches from the nut.

These facts having been shown the plaintiff, rested. Thereupon the defendant introduced evidence showing a proper construction of its elevated railway, and then called Samuel S. Roach as a witness, who testified that he was the defendant's trackwalker and inspector at the place where the injury was received by the plaintiff; that it was his duty to move carefully over the track during the daytime to examine carefully all the rails, switches, signals, bolts and fastenings of all kinds and to keep them tight; that in June, 1885, he was engaged in following out his instructions, and that he performed them to the best of his ability.

The defendant's counsel then moved the court to direct a verdict for the defendant, which motion was granted.

The plaintiff asked permission to go to the jury upon the question of the defendant's negligence upon the ground that the evidence showed that the presumption arose that the defendant was negligent in view of the fact that the iron plate fell from its structure upon the plaintiff. This request was denied and an exception was taken by the plaintiff to such denial and to the direction of a verdict in favor of the defendant.

No question is made but that the defendant's elevated railroad was properly constructed. It is claimed, however, that it was negligently suffered to get out of repair, and that because of such negligence the plaintiff suffered the injury complained of.

It was the duty of the defendant to exercise ordinary care for the purpose of keeping its structure in proper repair so as to prevent injury to persons passing over or underneath it.

The evidence showed that the bolt was broken, and that in consequence the iron plate or clip fell upon the plaintiff. The structure was consequently out of repair, and under the circumstances I think the presumption of negligence follows.

It has been held that where a building adjoining a street falls into the street in the absence of explanatory circumstances negligence will be presumed, and the burden is placed upon the owner of showing the use of ordinary care; that where a plaintiff was passing on a highway under a railroad bridge, when a brick fell from one of the pilasters upon which an iron girder of the bridge rested, striking him upon the shoulder, causing injury, negligence would be presumed; that where a barrel rolled out of the window of a warehouse on to a street, injuring a person passing,

negligence would be presumed; that where a person, while walking along the street in front of a building, was struck by a falling chisel, the presumption of negligence is sufficient to call for an explanation; that where plaintiff was injured while walking on the sidewalk of a street immediately under the defendant's railroad by being struck with a heavy piece of metal which fell from one of defendant's cars passing above, from the nature of the accident negligence might be inferred, etc. *Mullen v. Sr. John*, 57 N. Y. 567; *Kearney v. London R. R. Co.*, L. R. 5 Q. B. 411; S. C. 6 id. 759; *Byrne v. Boadle*, 2 Hurl. & Colt. 722; *Cahalin v. Cochran*, 1 N. Y. St. Rep. 583; *Goll v. Manhattan Ry. Co.*, 24 id. 24; affirmed 125 N. Y. 714; *Payne v. Troy & Boston R. R. Co.*, 83 id. 572.

The learned General Term, in its opinion, admits this proposition, and concedes that the fall of the plate or clip in the absence of an explanation raises a presumption of negligence. That court, however, reached the conclusion that the presumption was overthrown by the evidence produced on behalf of the defendant. As we have seen, that evidence was given by the witness Roach. It was his duty, as he testified, to examine carefully all rails, switches, signals, bolts and fastenings of all kinds, and to keep them tight. He further states that in June, 1885, he was engaged in following out his instructions and performed them to the best of his ability. In no place does he testify that he ever examined the bolt and clip which fell upon the plaintiff. He does not tell us how often he passed over the track, or to what extent he examined the bolts and fastenings. He only gives us his own conclusion that he performed his duty to the best of his ability. It does not appear to us that this was sufficient to remove the presumption which necessarily follows from the established fact that the bolt was broken, and in that particular the structure was out of repair and dangerous.

But even if this evidence was sufficient to remove the presumption as held by the General Term, the credibility of the witness would still be involved and be a question for the jury. This witness was the defendant's trackwalker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was, therefore, a person interested, and possibly actuated by a motive to shield himself from blame. *Dean v. Van Nostrand*. 23 Weekly Digest, 97; *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549-554.

It is claimed that the plaintiff neglected to produce upon the trial the broken bolt. His counsel said it was lost. He had established a *prima facie* case when he rested. The burden was then on the defendant. The upper portion of the broken bolt was left in the structure in the possession of the defendant who could have produced it had it so desired.

The plaintiff should have been permitted to submit to the jury the question of the defendant's negligence.

The judgment should consequently be reversed and a new trial granted with costs to abide the event. All concur, except FOLLETT, C. J., and BROWN and PARKER, JJ., dissenting.

Judgment reversed.

GRIFFEN v. MANICE.

(166 New York, 188.—1901.)

CULLEN, J. This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the defendant's negligence. On December 6, 1898, the defendant was the owner and in possession of an office building in the City of New York in which there was maintained and operated an elevator for the carrying of passengers to and from the several floors. The deceased was the secretary of the United States Fire Insurance Company, which had leased offices in the basement and also in the seventh and eighth stories. On the day in question, after having attended a meeting of the directors of the company, held on the eighth story, he took the elevator to return to the basement. The evidence tends to show that the elevator car descended with unusual rapidity, and, instead of stopping at the basement, which, was the lowest floor, passed beyond until it struck the bumpers at the bottom of the shaft with such force as to rebound about eighteen inches and throw some of the occupants of the elevator down. Almost immediately thereafter the counterbalance weights, which move in a reverse direction to that of the car and consist of pieces of iron, each from forty to sixty pounds in weight, fell down the shaft, breaking through the top of the elevator car. One of them struck the plaintiff's intestate on the head, killing him instantly. The plaintiff recovered a verdict at the Trial Term, and the judgment entered thereon was unanimously affirmed by the Appellate Division. By leave of the Appellate Division an appeal has been taken to this court.

As the decision below was unanimous, the exception to the denial of the defendant's motion to dismiss the complaint at the close of the evidence and the question of the sufficiency of the evidence to support the verdict cannot be argued in this court (Constitution, art. 6, sec. 9), and our review of the case must be confined to the correctness of the trial court in its rulings on the admission of evidence and its charge to the jury. We shall limit our discussion to the consideration of the three most important objections urged by the appellant against the recovery.

The trial court, over the appellant's exception, charged to the jury: "There is another rule which the plaintiff asks me to call to your attention,

and I am going to call to your attention the rule that where an accident happens which, in the ordinary course of business, would not happen if the required degree of care was observed, the presumption is that such care was wanting, and if, you find in this case that this accident was one which, in the ordinary course of business, would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting." It is insisted for the appellant that this instruction was erroneous, and that the jury was not authorized in this case to infer the existence of negligence from the accident alone. Primarily, it is argued that the principle which usually passes under the name of *res ipsa loquitur* applies only to cases where the relation between the parties is the contractual one of carrier or bailee, or in which the party injured has been injured while on a public highway. While there are some expressions to be found in text-books and decisions which seem to support this claim in my judgment it is unfounded and the application of the principle depends on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly so far as that relation defines the measure of duty imposed on the defendant. Writing of *res ipsa loquitur*, it is said in Shearman & Redfield on Negligence (sec. 59): "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." I think a single illustration will show the correctness of the view of the learned authors, that it is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The *res*, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish or to justify the jury in inferring the existence of the traversable or principal fact in issue—the defendant's negligence. The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident which the plaintiff is unable to present. Neither of

these rules—that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact, but slight evidence is requisite to shift on him the burden of explanation—is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined either in civil or criminal actions. In a prosecution for selling liquor without license, it is sufficient for the people to show the sale, leaving the defendant to show his license if he has one (*Potter v. Devo*, 19 Wend., 361). Recent possession of stolen goods warrants the inference that the possessor is the thief, both because experience shows that usually the party so in possession is the thief, and because the knowledge of how he came into possession of the goods is generally exclusively his own. In *Breen v. N. Y. Central, &c., R. R.* (109 N. Y. 297) it is said: “There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part.” I can see no reason why the rule thus declared is not applicable to all cases or why the probative force of the evidence depends on the relation of the parties. Of course, the relation of the parties may determine the fact to be proved, whether it be the want of the highest care or only want of ordinary care, and, doubtless, circumstantial evidence, like direct evidence, may be insufficient as a matter of law to establish the want of ordinary care, though sufficient to prove absence of the highest degree of diligence. But the question in every case is the same whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue. In *Mullen v. St. John*, (57 N. Y. 567) it was held that the falling of an adjacent building into the street, whereby the plaintiff traveling on the street was injured, was *prima facie* evidence of negligence. In *Piehl v. Albany R’y* (30 App. Div., 166, aff’d 162 N. Y., 617) a fly wheel was disrupted and a portion of it cast across the street into a saloon, killing the plaintiff’s intestate. It was held that the mere bursting of the fly wheel was not sufficient to warrant an inference of negligence. These two cases proceeded on the differing views that this court took as to the nature of the respective accidents, not on the situation of the parties. I think it may be safely said that we would not have held the defendant liable in the latter cases had Piehl been killed in the street, or in the earlier case, the defendant exempt, had the plaintiff been injured while in a neighboring building. To put it tersely, the court thought that in the absence of tempest or external violence a building does not ordinarily fall without negligence; while it also thought that the disruption of a fly wheel proceeds so often from causes which science has been unable

to discover or against which art cannot guard, that negligence cannot be inferred from the occurrence alone. Authority is not wanting on the point. In *Green v. Banta* (16 Jones & Spencer, 156) a workman was injured by the breaking down of a scaffold. In a suit against his master the court charged: "The fact that the scaffold gave way is some evidence—it is what might be called *prima facie* evidence—of negligence on the part of the person or persons who were bound to provide a safe and proper scaffold." This charge was held correct by the General Term of the Superior Court of the City of New York and the decision affirmed by this court (97 N. Y., 627). In *Mulcairns v. Janesville* (67 Wis., 24) the fall of a wall was held presumptive evidence of negligence in a suit by a servant against his master. In *Smith v. Boston Gas Light Company* (129 Mass., 318) it was held that the escape of gas from the pipes of a gas company was *prima facie* evidence of negligence. In this case there seems to have been no contractual relations whatever between the parties. In *Peck v. N. Y. Central R. R.* (165 N. Y., 347), which was an action for injury to plaintiff's property by fire, it was said: "But while it was necessary for the plaintiff to affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engine, for which the mere occurrence of the fire was not sufficient, it was not necessary that he should prove either the specific defect in the engine or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if he proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition or negligently operated." This is the principle which underlies the maxim of *res ipsa loquitur*. When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of *res ipsa loquitur*; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence. In *Benedick v. Potts* (88 Maryland, 52) it is said: "In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. . . . This phrase (*res ipsa loquitur*), which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as to the cause of that accident."

Returning now to the case before us, it appears that the deceased, was present by the implied invitation of the defendant, extended to him and

all others who might have lawful business on the premises, to use the elevator as a means of proceeding from one story to another. The defendant, therefore, owed the plaintiff the duty of using at least reasonable care in seeing that the premises were safe. The death of the plaintiff's intestate was caused by the fall of the counterbalance weights. These weights were held in a frame, to which was attached a rope or cable passing around a drum. The weights fell down from the frame and the rope was thrown off the drum. That no such accident could ordinarily have occurred had the elevator machinery been in proper condition and properly operated seems to me very plain. The court was, therefore, justified in permitting the jury to infer negligence from the accident, construing, as I do, the term accident to include not only the injury, but the attendant circumstances.

The next exception of the appellant relates to the degree of care which the learned trial court instructed the jury the defendant was bound to exercise. The court charged: "As to the machinery and appliances by which an elevator is moved and controlled in its ascent and descent an owner is bound to use the utmost care as to any defect which would be liable to occasion greater danger or loss of life, and he is, in that respect, subject to the same rule that applies to a railroad company in regard to its roadbed, engine and other similar machinery. Now, the rule that is applicable to a railroad company as to its roadbed, engine and machinery is that they are bound to exercise the utmost care and diligence and are liable for the slightest neglect against which human prudence and foresight might have guarded." This instruction is sustained by the decision of the Supreme Court of California in *Treadwell v. Whittier* (80 Cal., 574). In *McGrell v. Buffalo Office Building Co.* (153 N. Y., 265) the question was discussed by counsel, but not passed upon by the court in its disposition of the case. In determining the correctness of the rule of liability laid down by the trial court, the relation of the parties, which I think not controlling on the application of the maxim *res ipsa loquitur*, is of vital importance. Doubtless no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant as owner of the property is deemed to have extended to all who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition

for access and entering (2 Shearman & Redfield, sec. 704; *Beck v. Carter*, 68 N. Y., 283), but, "the measure of his duty was reasonable prudence and care" (*Larkin v. O'Neil*, 119 N. Y., 221; *Hart v. Grennell*, 122 N. Y., 371). If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator, no doubt, involves danger, and if accident occurs it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings. The boiler which furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous. Yet, it has never been attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care. It is very probable that, in the advance of mechanical arts, many new appliances will be introduced into buildings which will involve danger. It seems to me impracticable to distinguish as to the measure of the owner's duty between these appliances, and that such an attempt would involve great confusion in the law. I do not wish to be misunderstood. In the exercise of the same degree of care, different degrees of precaution may be necessary. The same man with equal prudence will leave an article of furniture unguarded in his house and carefully secrete or lock up jewelry or money. So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of this court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device and the most skillful operators. Such is the rule in the operation of railroads, and this degree of diligence may well be required where, for a consideration, there is a contract to carry safely. But common knowledge informs us that such a rule would be unreasonable as applied to elevators in ordinary buildings. There are elevators not only in great office buildings and hotels, but also in small buildings, and even in many private houses. Where there is little traffic the duty is at times imposed on an employee or servant with other work to perform. To require in all these cases (and I do not see how it is possible to distinguish between them on the law) the same measure of duty that is imposed on a railroad company or common carrier would be going too far. I think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care in the character of the appliance they provide and in its maintenance and operation. The stairways are always open to those who deem

this degree of diligence inadequate for their protection. The charge of the learned trial court was, therefore, erroneous.

Though what has been said disposes of the case, another question is presented to us, which, as it will arise on a new trial, we think proper to decide. By the written lease between the defendant and the insurance company it is provided that "the landlord shall not be responsible for any loss or injury arising from or during the use or operation of the elevator or the carelessness or negligence of any person." The appellant contends that by this provision he is exempt from any liability for the injuries to the plaintiff's intestate. The lease was attested by the deceased as secretary of the company in accordance with its by-laws. It must be presumed, therefore, that he was aware of its contents and assented to its terms, if those terms affected him. But the lease does not purport to apply to the personal rights of the officers or employees of the lessee (opinion, ALLEN, J., *Blair v. Erie R'y*, 66 N. Y., 313). There is this marked distinction between the present case and those in which the carrier has sought to be relieved from liability to a servant injured on a train by virtue of the terms of some agreement with the employer exempting the carrier from liability. In those cases the right of the employee to be on the train at all emanated from the contract made with his employer. Not so here. The right of the deceased to transportation in the elevator was based on the general invitation of the defendant to persons having business to transact in the building. The fact that he was in the employ of the tenant did not limit his rights.

The other exceptions argued by the learned counsel for the appellant relate to rulings that may not occur upon a new trial, and, therefore, do not require our notice; for the error in the charge already stated, the judgment should be reversed and a new trial granted; costs to abide the event.

VANN and WERNER, JJ., concur with CULLEN, J., for reversal; GRAY, J. reads concurring memorandum, with whom PARKER, Ch. J., concurs: BARTLETT, J., reads dissenting memorandum, with whom MARTIN, J., concurs.

Judgment reversed, etc.

*CONTRIBUTORY NEGLIGENCE.*¹

BALTIMORE & POTOMAC RAILROAD CO. v. JONES.

(95 United States, 439.—1877.)

ERROR to the Supreme Court of the District of Columbia, in an action by Jones to recover damages for injuries received on the road of the company. Judgment was rendered in favor of the plaintiff.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The defendant in error was the plaintiff in the court below.

Upon the trial there, he gave evidence to the following effect.

For several months prior to the 12th of November, 1872, he was in the service of the company as a day-laborer. He was one of a party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; at others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the

¹ "The plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has in any degree contributed to the result complained of, there can be no dispute. *Gay v. Winter*, 34 Cal. 153. The reason of this rule is, that both parties being at fault, there can be no apportionment of the damages, and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant, . . . The law does not justify or excuse the negligence of the defendant. It would, notwithstanding the negligence of the plaintiff, hold the defendant responsible, if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed where such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover, is limited by the reason upon which it is founded." *Needham v. San Francisco & San José Railroad Co.*, 37 Cal. 409, 419.

"The fact that courts of admiralty have always ordered compensation in cases of contributory negligence, apportioning the damages as they deemed to be just under the circumstances, and that this course has been universally acquiesced in and has given general satisfaction, affords strong proof that the stern rule of common law is not founded upon any immutable principle, but is simply the result of judicial unwillingness to trust juries to apportion damages between parties in fault: a task for which very few juries are competent." *Shearman & Redfield on Negligence*, (5th ed.) § 63.

approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both ways. The plaintiff had no connection with the train. On the 12th of November before mentioned, the party of laborers, including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses that stream, in filling flat cars with dirt and unloading them at an adjacent point. The train that evening consisted of a locomotive, tender, and box-car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time, and must hurry.

The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant and loaded with ties. These cars had become detached from another train of cars, and were standing on the track in the Virginia avenue tunnel. The accident was the result of negligence on the part of the defendant. Thereby one of the plaintiff's legs was severed from his body, and the other one severely injured. Nobody else was hurt, except two other persons, one riding on the pilot with the plaintiff, and the other one on the cars standing in the tunnel.

The defendant then gave evidence tending to prove as follows: About six weeks or two months before the accident, a box-car had been assigned to the construction train with which the plaintiff was employed. The car was used thereafter every day. About the time it was first used, and on several occasions before the accident, Van Ness notified the laborers that they must ride in the car and not on the engine; and the plaintiff in particular, on several occasions not long before the disaster, was forbidden to ride on the pilot, both by Van Ness and the engineer in charge of the locomotive. The plaintiff was on the pilot at the time of the accident, without the knowledge of any agent of the defendant. There was plenty of room for the plaintiff in the box-car, which was open. If he had been anywhere but on the pilot, he would not have been injured. The collision was not brought about by any negligence of the defendant's agents, but was unavoidable. The defendant's agents in charge of the two trains, and the watchman in the tunnel, were competent men.

The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box-car was locked when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that on the evening of the accident the engineer in charge of the locomotive knew that the plaintiff was on the pilot.

The evidence being closed, the defendant's counsel asked the court to instruct the jury as follows: "If the jury find from the evidence that the plaintiff knew the box-car was the proper place for him, and

if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not."

This instruction was refused, and the defendant's counsel excepted.

Three questions arise upon the record:—

1. The exception touching the admission of evidence.
2. As to the application of the rule relative to injuries received by one servant by reason of the negligence of another servant, both being at the time engaged in the same service of a common superior.
3. As to contributory negligence on the part of the plaintiff.

We pass by the first two without remark. We have not found it necessary to consider them. In our view, the point presented by the third is sufficient to dispose of the case.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Wharton on Negligence, sec. 1, and notes.

One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened.

In the former case, the plaintiff is entitled to recover. In the latter he is not. *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Butterfield v. Forrester*, 11 East. 58; *Bridge v. Grand Junction Railroad Co.*, 3 M. & W. 244; *Davis v. Mann*, 10 id. 546; *Clayards v. Dethick*, 12 Q. B. 439; *Van Lien v. Scoville Manufacturing Co.*, 14 Abb. Pr. (N. S.) 74; *Ince v. East Boston Ferry Co.*, 106 Mass. 149.

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It does appear that there was a watchman at the tunnel and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected, and competent for their places. For the purposes of this case, we assume that the defendant was guilty of negligence.

The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little, if not less, time than it took to climb to the pilot. The knowledge, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also, if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. *Hickey v. Boston & Lowell Railroad Co.*, 14 Allen, 429; *Todd v. Old Colony Railroad Co.*, 3 id. 18; 7 id. 207; *Gavett v. M. & L. Railroad Co.*, 16 Gray, 501; *Lucas v. N. B. & T. Railroad Co.*, 6 id. 64; *Ward v. Railroad Co.*, 2 Abb. Pr. (N. S.) 411; *Galena & Chicago Union Railroad Co. v. Yarwood*, 15 Ill. 468; *Doggett v. Illinois Central Railroad Co.*, 34 Iowa, 284.

The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse. *Gavett v. M. & L. Railroad Co.*, *supra*; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Pleasants v. Fant*, 22 id. 121.

Judgment reversed, and the cause remanded with directions to issue a venire de novo, and to proceed in conformity with this opinion.

SMITHWICK V. HALL & UPSON CO.

(59 Connecticut, 261.—1890.)

TORRANCE, J. The general question reserved for our advice in this case, is, whether the plaintiff upon the facts found is entitled to the substantial damages or only to the nominal damages found by the court below.

Inasmuch as that court has expressly found that the negligence of the defendant caused or contributed to the injury for which the plaintiff seeks to recover, the decision of the above general question depends upon this single point, namely, whether the acts and conduct of the plaintiff as set forth upon the record constitute or amount to such contributory negligence on his part as will bar his right to substantial damages. The facts found, so far as they bear upon the question for decision, are in substance the following:

The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood upon a platform about five feet wide and seventeen feet long, raised fifteen feet above the ground, and extending from the west side of the building easterly to a point about two feet east of the door or aperture through which the ice was taken into the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door and served as a protective railing or guard to that portion of the platform. In front of the door and east of it the platform was without guard or railing of any kind. A short time prior to the injury the foreman of the defendant stationed the plaintiff on the platform just west of the door and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform and the liability by inadvertence to misstep or fall or slip off, the latter being aggravated by the liability of the platform to become slippery from broken ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation.

After the foreman went away the plaintiff, in spite of the orders so given to him, and for reasons of his own apparently, went over to the east end of the platform and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow-workmen, seeing the plaintiff in that place, told him that "it

was not safe and to stand on the other side," but the plaintiff notwithstanding such warning, remained at work there.

While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform and thence to the ground. The plaintiff was struck by portions of the descending mass and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse. Most of the injuries which he actually sustained were occasioned by the fall.

The plaintiff had no knowledge that the wall would be likely to fall or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard."

In contemplation of the peril from the falling wall, it is found that "the spot where the plaintiff stood could not have been considered more dangerous than the place where he was directed to stand, though in fact most of the brick fell upon the side where he stood, and the result demonstrated therefore that the other side would have been safer in the event which occurred."

Upon these facts the defendant contends that the plaintiff, in going to and remaining on the east end of the platform, contrary to the orders and in spite of the warning given him, and in view of the obvious and manifest danger in so doing, was guilty of such contributory negligence as bars him of his right to recover more than nominal damages.

If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow-workman warned him, then this claim of the defendant would be a valid one. But upon the facts found it is without foundation.

The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe and would not be likely to fall upon him, no matter where he stood on the platform. He had no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its legal equivalent.

With respect to that danger the plaintiff, upon the facts found must be held to have acted as any reasonably careful man would have acted

under the same circumstances. In changing his position contrary to orders he voluntarily took the risk of all perils and dangers which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the defendant's negligence from other sources—dangers which he was not bound to anticipate and of whose existence he had no knowledge he took no risk and assumed no duty of taking care. It was the duty of the defendant on the facts found to warn the plaintiff against the danger from the falling wall.

Now the act or omission of a party injured which amounts to what is called contributory negligence, must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause or one of the proximate causes, and not merely as a condition.

In the case at bar the conduct of the plaintiff, as we have seen, was, with respect to the danger from the falling wall, not negligent for the want of knowledge or its equivalent on the part of the plaintiff.

Nor was his conduct, legally considered, a cause of the injury. It was a condition rather.

If he had not changed his position he might not have been hurt. And so too if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth or his not remaining at home that day, can in any just or legal sense be deemed a cause of the injury.

The court below has found that the plaintiff's fall in the position in which he stood was due to the giving way of the wall, and that most of his injuries were occasioned by the fall. His position there, upon the facts found, can no more be considered as a cause of the injury, than it could be in a case where the defendant, in doing some act near the platform without the plaintiff's knowledge, had negligently knocked him to the ground, or had negligently hit him with a stone. Had the injury been occasioned by a misstep or slip from the platform by the carelessness of the plaintiff, or for the want of a railing, the causal connection between the change of position and the injury would, legally speaking, be quite obvious; but from a legal point of view no such connection exists between the change of position and the giving way of the wall.

The plaintiff had full knowledge of and was abundantly cautioned against certain particular sources of peril and danger, and he voluntarily neglected the warnings and took the risk of those perils and dangers. He was injured through the negligence of the defendant from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the defendant to warn him.

Under these circumstances the failure or neglect to heed the warning does not constitute contributory negligence. *Gray v. Scott*, 66 Penn. St. 345.

In the case cited certain boys had been warned not to play at a certain point because of some particular and obvious dangers existing there. They failed to heed the warning, and one of them, playing at that place, was killed. His death was caused by the negligence of another and came from a source of danger not obvious and entirely different from any the boys had been warned against.

In answering the argument that the boy's failure to heed the warnings was a cause of his death and contributory negligence, the court say: "But because he was under the tramway in the passage below it is thought he was guilty of contributory negligence. He could not be guilty of negligence as to the defendant without there was some reason to expect danger and a duty of care on his part in relation to it. There was ordinarily none. He had a right therefore to suppose everything secure and safely managed on the tramway, and because it was not he was killed. Precisely the same argument could have been used if the boy had been killed in that place by the negligent use of fire-arms discharged a hundred yards off."

The defendant seems to claim however that, although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall; and that as he probably would not have fallen had he remained behind the railing, he contributed to his injury by placing himself where in case of such accident there was nothing to prevent his fall.

Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal standpoint, a contributing cause when it was but a condition.

And if the claim means that the plaintiff by his act increased the injury merely, then if this were true it would not be such contributory negligence as would defeat the action. To have that effect it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though of course it may affect the amount of damages recovered in a given case. *Gould v. McKenna*, 86 Penn. St. 297; *Stebbins v. Central R. R. Co.*, 54 Vt. 464. This claim, however, on the facts found, is wholly without foundation.

The plaintiff is entitled to judgment in his favor for one thousand dollars and the Superior Court is so advised.

In this opinion the other judges concurred.

ECKERT V. THE LONG ISLAND RAILROAD CO.

(43 New York, 502.—1871.)

APPEAL from a judgment of the General Term of the Supreme Court affirming a judgment in favor of the plaintiff, in an action to recover damages for the death of plaintiff's intestate, who, seeing a child three or four years old sitting or standing upon the track of defendant's road as a train of cars was approaching, and liable to be run over, if not removed, ran to it, and seizing it, threw it clear of the track, and, continuing across the track himself, was struck by some part of the locomotive or tender, thrown down, and received the injuries from which he died.

At the close of the plaintiff's case, counsel for the defendant moved for a nonsuit upon the ground that the deceased's negligence contributed to the injury. This was denied and an exception taken. At the close of the whole case, counsel for the defendant requested the court to charge, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover. This was refused and an exception taken, the question of the intestate's contributory negligence being submitted to the jury.

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appear-

ances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed, with costs.

CHURCH, C. J., and PECKHAM and RAPALLO, JJ., concur.

ALLEN, J. (dissenting). The plaintiff's intestate was not placed in the peril from which he received the injury resulting in his death, by any act or omission of duty of the defendants, its servants, or agents. He went upon the track of the defendant's road in front of an approaching train, voluntarily, in the exercise of his free will, and while in the full possession of all his faculties, and with capacity to judge of the danger. His action was the result of his own choice, and such choice not compulsory. He was not compelled, or apparently compelled, to take any action to avoid a peril, and harm to himself, from the negligent or wrongful act of the defendant, or the agents in charge of the train. The plaintiff's rights are the same as those of the intestate would have been, had he survived the injury and brought the action, and must be tested by the same rules; and to him and consequently to the plaintiff, the maxim *volenti non fit injuria* applies. It is a well established rule, that no one can maintain an action for a wrong, when he consents or contributes to the act which occasions his loss. One who with liberty of choice, and knowledge of the hazard of injury, places himself in a position of danger, does so at his own peril, and must take the consequences of his act. This rule has been applied to actions upon contract, under almost every variety of circumstance.

Whenever there has been notice of the danger, and freedom of action, the injured party has been compelled to bear the consequences of the action irrespective of the character and degree of negligence of other parties. *Gould v. Oliver*, 2 Scotts. N. R. 257; *Ilott v. Wilkes*, 3 B. & Ald. 311; *Slagan v. Slingerland*, 2 Caines, 219; *per* MARVIN, J., in *Corwin v. N. Y. and E. R. R. Co.*, 3 Ker. 42; *per* COWEN, J., in *Hatfield v. Roper*, 21 W. R. 620. The doctrine applicable to voluntary payments of money not recoverable by law grows out of this rule of law, and the rules governing in cases of contributing negligence of the injured party is nearly allied to, if not an outgrowth of the maxim *volenti non fit injuria*.

Whether the defendant was or was not guilty of negligence, or whatever the character and degree of the culpability of the defendant and its servants, is not material. The intestate had full view of the train and saw, or could have seen, the manner in which it was made up, and the locomotive attached, and the speed at which it was approaching, and, if in the exercise of his free will, he chose for any purpose to attempt the crossing of the track, he must take the consequence of his act. The defendant may have been running the train improperly, and perchance illegally, and so as to create a legal liability in respect to any one sustaining loss solely from such cause, but the company is not the insurer of, or liable to those who, of their own choice and with full notice, place themselves in the path of the train and are injured.

It is not the law that the coöperating act of the injured party must be culpable or wrong in intention. It may be merely negligence or the result of the free exercise of the will. *Per* BEARDSLEY, J., in *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255. The rescue of the child from apparent imminent danger was a praiseworthy act and entitled the plaintiff to the favorable consideration of the court and to a lenient and liberal interpretation and application of the rules of law in her behalf. But the principles of law cannot yield to particular cases.

The act of the intestate in attempting to save the child was lawful as well as meritorious, and he was not a trespasser upon the property of the defendant, but it was not in the performance of any duty imposed by law, or growing out of his relation to the child, or the result of any necessity. There is nothing to relieve it from the character of a voluntary act, the performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred. *Evansville R. R. Co. v. Hyatt*, 17 Ind. 102, is in circumstance somewhat like the case before us, and the decision is in accord with the views herein expressed.

I am of the opinion that the judgment of the Supreme Court and of the City Court of Brooklyn should be reversed and new trial granted, costs to abide event.

FOLGER, J., concurred in the foregoing opinion. *Judgment affirmed.*

MORRIS V. LAKE SHORE & MICH. SO. R'y Co.

(148 New York, 182.—1896.)

APPEAL from a judgment of the general term of the Supreme Court, which affirmed a judgment entered upon a verdict in favor of plaintiff.

MARTIN, J. This was an action to recover damages sustained by the death of the plaintiff's intestate, and it was based upon the alleged negligence of the defendant. The decedent resided upon a farm in the town of Ripley, Chautauqua county. The defendant's road passed through the farm, and over the railroad was a farm crossing, which had been provided by the defendant. The decedent's house and barns were upon one side of the railroad, while his pasture was upon the opposite side. On the 25th day of August, 1881, the decedent was struck and killed by a passing train at or near the crossing. At the time he was driving his cows from the pasture to this house or barns. The defendant's right of way was 66 feet in width, and there was a gate on each side at the crossing. The decedent's house, where he had lived many years, was in sight of the track; and he was familiar with the time when the defendant's trains passed his place. The train which caused the accident passed over this crossing at a high rate of speed at about the same time each day, and the decedent knew that it was often late. The grade and tracks of the railroad in that vicinity were from 3 to 6½ feet above the surface of the adjacent land. There were two tracks of the usual width, about 8 feet apart. The train was upon the north track, and the decedent approached the road from the south. The north track being about 37 feet from the south gate, the decedent had to travel that distance before reaching the place where the injury occurred. The track was straight from the crossing west for about 1,450 feet, and a person on the south track could see a train coming from the west about that distance, and could be seen from the engine the same distance; but if at the south gate, he could see the train and be seen by the engineer for only about 556 feet. The evidence is to the effect at the time or immediately preceding the accident the decedent was trying to hurry his cows across the defendant's railroad in front of the approaching train, and that the cows were huddled together. The engineer could have seen the cows on the track when he was about 1,450 feet from the crossing, if they were there at that time; but there is no evidence that they were, and any conclusion to that effect was necessarily based upon mere speculation or conjecture.

The plaintiff's witnesses testified that no bell was rung or whistle

sounded as the train approached the Dixon crossing, which was 556 feet west of the place of the accident. This was denied. So far as there was any evidence upon the subject, it tended to show that when the accident occurred the decedent, while endeavoring to save his cows by getting them over the track before the train reached the crossing, placed himself in a position of danger which resulted in his death. The case was submitted to the jury upon the theory that it might find that the defendant's engineer was negligent in not giving a signal, or in not stopping the train before the accident, upon the supposition that the cows were upon the track, and could have been seen by the engineer at a distance from the crossing that would have enabled him to avoid the accident, although there was no such evidence. We are of the opinion that the evidence was insufficient to justify the court in submitting to the jury the question of the defendant's negligence. As the trial court in effect said, the defendant owed the decedent no duty to sound its whistle or ring its bell either at the Dixon crossing or the farm crossing where the accident occurred. The evidence was insufficient to sustain the proposition that the defendant's engineer was negligent in not seeing the cows upon the track in time to avoid the accident, and was too speculative and uncertain to uphold the finding of the jury. Negligence is not to be presumed; but to justify the submission of that question to a jury there must be more than a mere surmise that there may have been negligence on the part of the defendant. There must be evidence upon which the jury might reasonably and properly conclude that there was negligence. The burden of showing that her intestate was free from contributory negligence rested upon the plaintiff. That she has not successfully borne that burden is quite manifest. The only theory upon which the respondent now seeks to uphold the refusal of the court to nonsuit upon the ground that the decedent was guilty of contributory negligence is that, although the decedent knew that the train was approaching, he was justified in placing himself in a position of danger to rescue his property from injury or destruction. We think the principle contended for cannot be sustained. In *Eckert v. Railroad Co.*, 43 N. Y. 502, it was in effect held that a person could not place himself in a situation of danger simply for the protection of his property without being guilty of such negligence as would preclude his recovery. In *Schneider v. Railroad, Co.*, 133 N. Y. 583, it was said: "If the party by his own negligence has placed himself in a situation of peril, and, being called upon in a sudden exigency to act, mistakes his best course through an error of judgment, he is not thereby relieved." A careful examination of the evidence in this case leads us to the conclusion that the evidence was not sufficient to justify the submission to the jury of either the question of the defendant's negligence or the question of the decedent's freedom from contributory negligence, and that the court erred in denying the defendant's motion for a nonsuit. It follows that

the judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

All concur, except ANDREWS, C. J. and HAIGHT, J., not sitting. VANN, J., not voting.

Judgment reversed.

SAME: BURDEN OF PROOF.¹

HOYT v. THE CITY OF HUDSON.

(41 Wisconsin, 105.—1876.)

APPEAL from the Circuit Court, in an action to recover damages for personal injuries alleged to have been caused by negligence on the part of the defendant, in suffering ice and snow to accumulate on the sidewalk in one of its streets, whereby the plaintiff slipped and broke his leg.

At defendant's request, the court, among other things, charged the jury as follows:

"In an action of this nature, for personal injuries caused by a defect in the highway, the person injured cannot recover if all the evidence in the case is equally consistent with either care or negligence on his part.

"It is well settled that, in order to recover for an injury on the ground of negligence, it must appear that the plaintiff was in the exercise of due care in respect to the occurrence from which the injury arose; or that the injury was in no part due to his own fault or want of care. The burden rests upon the plaintiff to make this appear.

"This burden is held to be on the plaintiff for the reason that it is a subordinate proposition necessarily involved in the more general one upon which the action is founded, to wit: that the injury to the plaintiff was caused by the negligence or wrongful act of the defendant. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established.

¹ The plaintiff must prove his freedom from fault in Connecticut, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi and New York.

The defendant has the burden of proving the contributory negligence of the plaintiff in the U. S. Supreme Court, and in Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Maryland, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin.

For cases in the above jurisdictions see Shearman & Redfield on Negligence (5th ed.), §§ 107 and 108, notes.

"All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault."

The following request from the plaintiff was refused: "Unless there is something in the evidence from which the jury find that the plaintiff was guilty of negligence, they cannot so find. The law does not raise a presumption of negligence; and if the plaintiff was guilty of any negligence, the burden of proving such negligence is upon the defendant."

Verdict for defendant; plaintiff appeals.

LYON, J. In the record before us we find no affirmative evidence from which the jury could properly find that the plaintiff was guilty of any negligence which contributed proximately to cause the injury of which he complains. The jury were instructed, however, that the burden was upon the plaintiff to prove that he was in the exercise of due care, when injured. Inasmuch as the plaintiff failed to make any such proof, if the instruction is correct, the jury should have been directed to return a verdict for the defendant. But the learned circuit judge further instructed the jury that if the circumstances under which the injury was received, as proved, show nothing in the acts or omissions of the plaintiff to which the injury might be attributed, in whole or in part, "the inference of due care may be drawn from the absence of all appearance of fault." That is to say, the jury were first told that the burden was upon the plaintiff to prove that he was in the exercise of due care when injured; and then, that they were at liberty to infer from his entire failure to introduce any evidence on the subject, that he did exercise due care. This involves the absurdity of proving a fact by failing to prove it. Such an *onus probandi* is incomprehensible to us. See *Mil. & Ch. R. R. Co. v. Hunter*, 11 Wis. 160.

It should be stated, however, that the instructions are fully sustained by the late case of *Ryseron v. Abington*, 102 Mass. 526, and by other decisions of that court. But we cannot adopt a decision which involves so manifest an absurdity, though made (as that was) by one of the ablest courts in the country. The common sense view of the subject is, that if the burden of proving his own due care to avoid the injury is upon the plaintiff, he must prove such care, either by direct evidence, or by showing *res gestæ* which exclude fault on his part, or he must fail in the action. But if the burden is upon the defendant to prove that the plaintiff was guilty of contributory negligence, and there is nothing in the evidence tending to show such negligence, the court should hold, as a proposition of law, that the plaintiff was free from fault, and it is error to submit the question to the jury.

Sufficient has been said to show that the important question in this case is, Was the *onus* upon the plaintiff to prove that, when injured, he was in the exercise of proper care to avoid the injury, or was it upon the defendant to prove that the plaintiff was guilty of some negligence which contributed proximately to the injury of which he complains? If the *onus* was upon the plaintiff, he failed to meet its requirements, and the verdict and judgment were properly for the defendant; but if upon the defendant, the defense of contributory negligence was not established, and the action could not properly be defeated on that ground. But the action may have been defeated on that ground alone. It cannot be determined from the record that it was not. Hence, if the court erred in the instructions—if the *onus probandi* was upon the defendant, the error is material, and the judgment must be reversed.

In *Chamberlain v. R. R. Co.*, 7 Wis. 425, and *Dressler v. Davis*, id. 527, this court held that in an action for injuries caused by negligence the burden is upon the plaintiff to show himself free from contributory fault. This rule was vigorously assailed, as unsound in principle, by the late Mr. Justice PAINE, in *R. R. Co. v. Hunter*, 11 Wis. 160; but it does not seem to have been overturned. Yet in *Achtenhagen v. Watertown*, 18 id. 331, DIXON, C. J., seems to concede that the rule no longer prevails in this state. Since *R. R. Co. v. Hunter*, we are not aware that the subject has been discussed or considered here. The question is not one to which the rule *stare decisis* is applicable; and in view of the difference of opinion which members of this court have entertained in regard to it at different times, we feel at liberty to consider and determine the question on the merits, untrammelled by the earlier decisions, or by the later opinions of the court or any justice thereof, in opposition thereto.

It has been held in Massachusetts and several other states, that in actions of this kind the plaintiff must prove that he was free from contributory fault, or fail in his action. These decisions go upon the ground that there can be no recovery unless two conditions concur, to wit, negligence of the defendant and freedom of the plaintiff from contributory fault; and that it is incumbent on the plaintiff to show the existence of both conditions.

The same proposition may be stated in another form. The defendant is only liable to respond in damages for an injury caused by his negligence. But if the negligence of the plaintiff concurred with that of the defendant to produce the injury, it cannot correctly be said that the same was caused by the negligence of the defendant. The meaning of the rule is, that to render the defendant liable, the injury must be the result of his negligence alone. Hence, to establish a cause of action, the plaintiff must show that the negligence of the defendant was the sole proximate cause of the injury; and to do this he must necessarily prove himself free from contributory fault.

Many of the cases which hold the above doctrine will be found cited in the notes to §§ 33 and 34 of Shearman & Redfield on Negligence, and in the brief of counsel for the defendant.

On the other hand, the contrary doctrine is maintained in many cases, some of which are cited in the brief of counsel for the plaintiff and in the above notes in Shearman & Redfield. These cases hold that if the negligence of the plaintiff concurred in producing the injury complained of, that is purely matter of defense, and hence the burden of proving it is upon the defendant. This is the view taken by Judge DUER in *Johnson v. The Hudson River R. R. Co.*, 5 Duer, 21; and that able judge rested his opinion mainly on two grounds: 1. He held that in the absence of proof there is no presumption that the person injured was guilty of negligence which contributed to the injury, any more than there is a like presumption that he whose act or omission caused the injury was guilty of negligence. And inasmuch as the plaintiff must prove affirmatively that the act or omission of the defendant which resulted in the injury, was negligent, before he can recover, so in like manner the defendant must prove affirmatively that the act or omission of the plaintiff contributed proximately to the injury, in order to defeat the action on that ground. 2. He further held that no averment is required in the complaint in such an action that the plaintiff, when injured, was in the exercise of proper care and caution to avoid the injury; and, from the elementary rule that every fact is necessary to be averred in the complaint which the plaintiff is bound to prove in order to maintain his action, he draws the conclusion that the plaintiff in such an action is not bound to prove in the first instance his own freedom from contributory fault; in other words, that the *onus probandi* is not upon him to disprove his own negligence, but is upon the defendant to prove such negligence.

In the elementary treatise above referred to (Shearman & Redfield on Negligence), the authors agree with Judge Duer, and, discussing the rules of the cases which hold the *onus* to be upon the plaintiff to prove his freedom from contributory fault, they say: "If this broad rule is adopted, even if we distinguish such defenses as payment, release, satisfaction, etc., as relating to facts subsequent to the act complained of, we cannot see upon what ground the plaintiff is to be excused from proving that he is not an alien enemy, if war exists, or that he was not in a state prison, or that the defendant was not acting under the authority of any statute in what he did, or, in cases where the defendant would not be responsible if he was a mere agent, that he was not acting as an agent. And at any rate, what possible ground of distinction can there be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*? Yet we are not

aware of any case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault.”

It seems to us that the reasons in favor of the rule which cast the burden of proof in such cases upon the defendant, are the stronger and better reasons; and that such rule rests upon sound legal principles, and ought to prevail in this state. We therefore hold that, in the absence of any evidence tending to show that the plaintiff was chargeable with negligence contributing to the injury of which he complains, the presumption of law is that he was free from such negligence, and the burden was upon the defendant to prove such contributory fault, if the same was relied upon as a defense.

The rule here adopted does not apply to a case in which the proofs on behalf of the plaintiff show, or tend to show, his contributory negligence. If such negligence conclusively appears, the court will nonsuit the plaintiff, or direct the jury to find for the defendant; if the evidence only tends to show such contributory negligence, the question must go to the jury, to be determined, like any other question of fact, upon a preponderance of the evidence.

Inasmuch as the instructions were predicated upon an erroneous rule of law, the judgment of the Circuit Court must be reversed. We do not deem it necessary to determine the other questions argued at the bar.

Judgment reversed, and cause remanded for a new trial.

HALE V. SMITH.

(78 New York, 480.—1879.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of defendant, in an action to recover damages for injuries to a horse, wagon and harness while in the custody of defendant's intestate. The intestate hired the horse and wagon of the plaintiff, and on his drive stopped at Macedon and there stabled his horse for a short time. On resuming the drive, the horse suddenly started, ran away and the injuries complained of resulted. Plaintiff claimed that the stableman at Macedon improperly harnessed the horse, and the damages resulted from such negligence. Defendant claimed that the injuries were due to defects in the harness and the viciousness of the horse.

RAPALLO, J. This case is so fully considered in the opinion of RUMSEY, J., on the motion for a new trial, in which we concur, that we deem

it necessary only to refer to the exception to the concluding sentence of the charge, on which special stress has been laid by the appellant on the argument in this court. The judge charged in regard to the viciousness of the horse, that it was incumbent upon the plaintiff to show by a preponderance of evidence, that the horse was not vicious. This charge if standing alone would be subject to criticism, and if the judge had instructed the jury that the failure of the plaintiff to prove that the horse was not vicious, would of itself entitle the defendant to a verdict, it would have been erroneous. But taking the whole charge, in connection with the evidence, the jury could not have so understood the judge. He had distinctly charged them, that if the damage was occasioned by a defect in the horse or in the harness, and would not have occurred if those defects had not existed, then the defendant was not responsible. Also that if the defendant or his servants were to some extent guilty of negligence, yet if the defect or default of the property did in fact exist, and but for such defect or fault in the property the damage would not have resulted, the plaintiff could not recover.

The jury were thus distinctly instructed that to constitute a defense it was not enough to show that the horse was vicious, but that to exempt the defendant from responsibility the damage must have been caused or contributed to by that circumstance. In the portion of the charge excepted to, there is nothing which withdraws or conflicts with this instruction.

The sentence excepted to relates wholly to the burden of proof on the question of the viciousness of the horse, and not to the sufficiency of that fact alone to constitute a defense. In this aspect it must be construed with reference to the state of the evidence. If there had been no evidence in the case to show that the horse was vicious, the charge might be subject to the criticisms made. But that question was one of the issues in the case, upon which evidence had been adduced on both sides. The burden of proof on the whole case was with the plaintiff, and it was incumbent upon him to satisfy the jury by a preponderance of proof that the injury had been occasioned by the negligence of the defendant's intestate alone, and that he himself was free from fault. In cases where contributory negligence may be claimed, it is settled in this court, that the absence of contributory negligence is part of the plaintiff's case, and the burden of satisfying the jury on that point rests upon him. *Reynolds v. N. Y. Cent. R. R. Co.*, 58 N. Y. 248; *Gaynor v. Old Col. R. R.*, 100 Mass. 208; *Murphy v. Deane*, 101 id. 466; *Park v. O'Brien*, 23 Conn. 339. The character of the horse was the main fact upon which the question of contributory negligence depended, and having been assailed by evidence the burden rested upon the plaintiff to sustain it, or to show that it did not contribute to the damage. *Button v. Hudson R. R.*, 18 N. Y. 248. If the evidence left the jury in

doubt whether the injury was occasioned by the fault of defendant's intestate alone, or was caused or contributed to by the viciousness of the horse, the defendant was entitled to the benefit of that doubt, and the plaintiff had failed to make out his case. This is only stating in another form the proposition that the plaintiff was bound to prove the controverted facts by a preponderance of testimony.

The judgment should be affirmed.

All concur.

Judgment affirmed.

IMPUTATION OF NEGLIGENCE.

(a) PASSENGERS.¹

LITTLE V. HACKETT.

(116 United States, 366.—1885.)

FIELD, J. On the 28th of June, 1879, the plaintiff below, defendant in error here, was injured by the collision of a train of the Central Railroad Company of New Jersey with the carriage in which he was riding; and this action was brought to recover damages for the injury. The railroad was at the time operated by a receiver of the company appointed by order of the court of chancery of New Jersey. In consequence of his death the defendant was appointed by the court his successor, and subjected to his liabilities; and this action was prosecuted by its permission.

It appears from the record that on the day mentioned the plaintiff went on an excursion from Germantown, in Pennsylvania, to Long Branch, in New Jersey, with an association of which he was a member.

¹ "The only remnant of this doctrine which remains in sight anywhere is the theory that one who rides in a *private* conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood v. Bryan*, was invented in Wisconsin, and sustained by a process of elaborate reasoning (*Prideaux v. Mineral Point*, 43 Wisc. 513); and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana (*Whittaker v. Helena*, 14 Mont. 124); and in Nebraska (*Omaha etc., R. Co. v. Talbot*, 48 Neb. 627) without any reasoning whatever; which last is certainly the best method of reaching a conclusion, directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the 'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three States mentioned, and it must soon be abandoned even there." *Shearman and Redfield on Negligence*, (5th ed.) § 66.

Whilst there, he dined at the West End Hotel, and after dinner hired a public hackney-coach from a stand near the hotel, and taking a companion with him, was driven along the beach to the pier where a steamboat was landing its passengers, and thence to the railroad station at the West End. On arriving there he found he had time before the train left to take a further drive, and directed the driver to go through Hoey's Park, which was near by. The driver thereupon turned the horses to go to the park, and in crossing the railroad track near the station for that purpose, the carriage was struck by the engine of a passing train, and the plaintiff received the injury complained of. The carriage belonged to a livery-stable keeper and was driven by a person in his employ. It was an open carriage, with the seat of the driver about two feet above that of the persons riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury, and no exception was taken to its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them that unless the plaintiff interfered with the driver and controlled the manner of his driving, his negligence could not be imputed to the plaintiff.

"I charge you," said the presiding judge to them, "that where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time." "The passenger in the carriage may direct the driver where to go—to such a park or to such a place that he wishes to see; so far the driver is under his direction; but my

charge to you is that, as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of it and has charge of the team—is the person responsible for the manner of driving, and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot-passengers or to anybody else, why, then, he might be liable, because it was by his own command and direction that it was done, but ordinarily in a public hack the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference.”

The plaintiff recovered judgment, and this instruction was alleged as error, for which its reversal was sought.

That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound—that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like. Such a relation involves considerations which have no bearing upon the question before us.

To determine, therefore, the correctness of the instruction of the court below—to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident he is not responsible for the driver's negligence, nor precluded thereby from recovering in the action—we have only to consider whether the relation of master and servant existed between them. Plainly, that relation did not exist. The driver was the servant of his employer, the livery-stable keeper, who hired him out with horse and carriage, and was responsible

for his acts. Upon this point we have a decision of the Court of Exchequer in *Quarman v. Burnett*, 6 M. & W. 499, 507. In that case it appeared that the owners of a chariot were in the habit of hiring for a day, or a drive, horses and a coachman from a job-mistress, for which she charged and received a certain sum. She paid the driver by the week and the owners of the chariot gave him a gratuity for each day's service. On one occasion he left the horses unattended and they ran off and against the chaise of the plaintiff, seriously injuring him and the chaise, and he brought an action against the owners of the chariot and obtained a verdict; but it was set aside on the ground that the coachman was the servant of the job-mistress, who was responsible for his negligence. In giving the opinion of the court, Baron PARKE said: "It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of the servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like." As none of these circumstances existed it was held that the defendants were not liable, because the relation of master and servant between them and the driver did not exist.

This doctrine was approved and applied by the Queen's Bench Division, in the recent case of *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890. The corporation owned a watercart and contracted with a Mrs. Dean for a horse and driver, that it might be used in watering the streets. The horse belonged to her, and the driver she employed was not under the control of the corporation otherwise than its inspector directed him what streets or portions of streets to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart, and, in an action against the corporation for the injury, he recovered a verdict, which was set aside upon the ground that the driver was the servant of Mrs. Dean, who had hired both him and the horse to the corporation.

In this country there are many decisions of courts of the highest character to the same effect, to some of which we shall presently refer.

The doctrine resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him, or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrongdoer when they who are in charge can recover. In other words, that their contributory negligence is imputable

to him, so as to preclude his recovery for an injury when they by reason of such negligence could not recover. The leading case to this effect is *Thorogood v. Bryan*, decided by the Court of Common Pleas in 1849, 8 C. B. 114. It there appeared that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus running on the same line of road. Both vehicles had started together and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up to the curb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterwards died from the injuries sustained. The court, among other things, instructed the jury, that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury found for the defendant, and the court discharged a rule for a new trial for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by Mr. JUSTICE COLTMAN, that the deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the owner, and her servants, that if any injury resulted from their negligence, he must be considered a party to it; "In other words," to quote his language, "the passenger is so far identified with the carriage in which he is traveling, that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury." Mr. JUSTICE MAULE, in the same case, said that the passenger "chose his own conveyance and must take the consequences of any default of the driver he thought fit to trust." Mr. JUSTICE CRESSWELL said: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action and I must confess I see no reason why a passenger, who employs a driver to carry him, stands in any different position." Mr. JUSTICE WILLIAMS added that he was of the same opinion. He said: "I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by."

What is meant by the passenger being "identified with the carriage," or "with the person having its management," is not very clear. In a recent case, in which the Court of Exchequer applied the same test to a passenger in a railway train, which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, Baron POLLACK said that he understood it to mean

"that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." *Armstrong v. Lancashire & Yorkshire Railroad Co.*, L. R. 10 Ex. 47, 52. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position with reference to the negligent act as the driver who committed it, or as his master, the owner. Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration.

The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal coöperation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.

Thorogood v. Bryan has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded. In *The Milan*, Dr. LUSHINGTON, the judge of the High Court of Admiralty, in speaking of that case, said: "With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against *Hay v. La Neve*, and the ordinary practice of the court of admiralty." Lush. 388, 403.

In this country the doctrine of *Thorogood v. Bryan*, has not been generally followed. In *Bennet v. New Jersey Railroad Co.*, 36 N. J. L. 225, and *New York, Lake Erie & Western Railroad Co. v. Steinbrenner*, 47 N. J. L. 161, it was elaborately examined by the Supreme Court and the Court of Errors of New Jersey, in opinions of marked ability and learning, and was disapproved and rejected. In the first case it was held that the driver of a horse car was not the agent of the passenger so as to render the passenger chargeable for the driver's negligence. The car, in

crossing the track of the railroad company, was struck by its train, and the passenger was injured, and he brought an action against the company. On the trial the defendant contended that there was evidence tending to show negligence by the driver of the horse car, which was in part productive of the accident, and the presiding judge was requested to charge the jury, that if this was so, the plaintiff was not entitled to recover; but the court instructed them that the carelessness of the driver would not affect the action or bar the plaintiff's right to recover for the negligence of the defendant. And this instruction was sustained by the court. In speaking of the "identification" of the passenger in the omnibus with the driver, mentioned in *Thorogood v. Bryan*, the court, by the Chief Justice, said: "Such identification could result only in one way, that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And, so on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. 7 Vroom, 227, 228.

In the latter case it appeared that the plaintiff had hired a coach and horses, with a driver, to take his family on a particular journey. In the course of the journey, while crossing the track of the railroad the coach was struck by a passing train and the plaintiff was injured. In an action brought by him against the railroad company, it was held that the relation of master and servant did not exist between him and the driver, and that the negligence of the latter, co-operating with that of persons in charge of the train, which caused the accident, was not imputable to the plaintiff, as contributory negligence, to bar his action.

In New York a similar conclusion has been reached. In *Chapman v. New Haven Railroad Co.*, 19 N. Y. 341, it appeared that there was a collision between the trains of two railroad companies by which the

plaintiff, a passenger in one of them, was injured. The Court of Appeals of that State held that a passenger by railroad was not identified with the proprietors of the train conveying him, or with their servants, as to be responsible for their negligence, and that he might recover against the proprietors of another train for injuries sustained from a collision through their negligence, although there was such negligence in the management of the train conveying him as would have defeated an action by its owners. In giving the decision the court referred to *Thorogood v. Bryan*, and said that it could see no justice in the doctrine in connection with that case, and that to attribute to the passenger the negligence of the agents of the company, and thus bar his right to recover, was not applying any existing exception to the general rule of law, but was framing a new exception based on fiction and inconsistent with justice. The case differed from *Thorogood v. Bryan* in that the vehicle carrying the plaintiff was a railway train instead of an omnibus, but the doctrine of the English case, if sound, is as applicable to passengers on railway trains as to passengers in an omnibus; and it was so applied, as already stated, by the Court of Exchequer in the recent case of *Armstrong v. Lancashire & Yorkshire Railroad Co.*

In *Dyer v. Erie Railway Co.*, 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown from the wagon, and was injured by the train, which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and, although he traveled voluntarily, he was not responsible for the negligence of the driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses.

A similar doctrine is maintained by the courts of Ohio. In *Transfer Company v. Kelly*, 36 Ohio St. 86, 91, the plaintiff, a passenger on a car owned by a street railroad company, was injured by its collision with a car of the Transfer Company. There was evidence tending to show that both companies were negligent, but the court held that the plaintiff, he not being in fault, could recover against the Transfer Company, and that the concurrent negligence of the company on whose cars he was a passenger could not be imputed to him, so as to charge him with contributory negligence. The Chief Justice, in delivering the opinion of the court, said: "It seems to us, therefore, that the negligence of the company, or

of its servants, should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed, where the negligence of the company, or its servant, was the sole cause of the injury." "Indeed," the Chief Justice added, "it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury caused directly and proximately by the latter's negligence, should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd."

In the Supreme Court of Illinois the same doctrine is maintained. In the recent case of the *Wabash, St. Louis & Pacific Railway Co. v. Shacklet*, 105 Ill. 364, the doctrine of *Thorogood's Case* was examined and rejected, the court holding that, where a passenger on a railway train is injured by the concurring negligence of servants of the company on whose train he is traveling, and of the servants of another company with whom he has not contracted, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the company on whose train he was traveling.

Similar decisions have been made in the courts of Kentucky, Michigan and California. *Danville, etc., T. Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, etc., R. Co. v. Case*, 9 Bush, 728; *Cuddy v. Horn*, 46 Mich. 596; *Tompkins v. Clay Street R. Co.*, 4 West Coast Reporter, 537.

There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. "If the law were otherwise," as said by Mr. Justice DEPUE in his elaborate opinion in the latest case in New Jersey, "not

only the hirer of the coach but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried." *New York, Lake Erie & Western Railroad v. Steinbrenner*, 47 N. J. L. 161, 171.

In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver further than to indicate the places to which he wished him to drive. The instruction of the court below, that unless he did exercise such control and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him, so as to bar his right of action against the defendant, was therefore correct, and

The judgment must be affirmed.

(b) *CHILDREN NON SUI JURIS*.¹

HARTFIELD V. ROPER

(21 Wendell, 615.—1839.)

ACTION on the case by the plaintiff, William Hartfield, by his next friend, Gabriel Hartfield, for injuries sustained by being run over, as alleged, by the defendants, with a sleigh and horses. In March, 1836, the plaintiff, a child of about two years of age, was standing or sitting in the beaten track of a public highway, and no person near him; the defendant Roper was driving a sleigh and horses upon the same road, and before the child was perceived the horses passed over him. He was discovered by Newell, the other defendant, who was in the same sleigh, and on his exclaiming that a child had been run over, the horses were immediately stopped by Roper and backed, and the sleigh prevented from passing over the child. The sleigh was at the time of the

¹ The rule of imputed negligence seems to be established in California, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, and New York. *Contra*: Alabama, Connecticut, Georgia, Illinois, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Utah and Virginia. For cases *pro* and *con* the rule, see *Shearman & Redfield on Negligence* (5th ed.), §§ 74 and 78, notes.

injury descending a hill, at the foot of which was a bridge, and the child was in the road about six or eight rods from the bridge. The course of the road was such that in descending the hill there was a fair view of the road beyond the bridge. The defendant Roper had no sleigh bells. The horses at the time of the injury were trotting, but not at great speed; Roper sat on the front seat driving, and Newell sat on the back seat. A motion for a nonsuit was denied, and the jury, under the charge of the court, returned a verdict for the plaintiff. The defendants then moved for a new trial.

By the Court, COWEN, J. The injury to this child was doubtless a very serious misfortune to him. But I have been utterly unable to collect, from the evidence, anything by which the jury were authorized to impute such carelessness as rendered these defendants responsible. It is true, they might have seen the child from the turn of the road in descending, had they looked so far ahead; but something must be allowed for their attention to the management of the horses and their own safety in descending the hill to a bridge. So unobserving were they in fact, that Mrs. Lewis, who sat in the rear of the sleigh, on the left side, and therefore in the best position of the three to overlook the road in its full extent, as far as the place where the child was, did not discern him. It was somewhat severe, in a case like this, to allow testimony of Newell's ability to pay, though it was not objected to. It seems to imply that he had been so brutal as silently to allow Roper's going on and endangering the child's life, after he, Newell, had discovered it to be in the road. But, perhaps, no objection can now be heard to that evidence having been received, because it was not made at the trial.

No doubt the action was properly brought in the name of the child. Nor is there any objection to its form, since the statute. 2 R. S. 456, § 16, 2d ed. Nor could the father have brought an action for loss of service, in respect to so small a child, according to the English case of *Hall v. Hollander*, 4 Barn. & Cress. 660; though I should think it quite questionable whether that case can be considered as law here. If the defendants were, in truth, so reckless of the child's safety, as to run over it, in the way described, after knowing it to be in the road, the verdict is none too large. But such trifling with human life ought not to be presumed; and there was no proof of it, either direct or circumstantial. This is not a case, however, for interfering upon the ground of excessive damages.

The only question which seems to be open for our consideration is, that of negligence. This respects both parties. It is quite necessary to drive at a moderate pace, and look out against accidents to children and others, in a populous village or city. See *McAllister v. Hammond*,

6 Cowen, 342, and *per* LAWRENCE, J., in *Leame v. Bray*, 3 East. 597. But this accident happened in the country, where was a solitary house; a child belonging to it happening to be in the road, a thing most imprudently allowed by its parents, and what could have been easily prevented by ordinary care. Travelers are not prepared for such things. They, therefore, trot their horses. They are warrantably inattentive to small objects in the road, which they may be incapable of seeing in the course of a drive for miles through the country, among a sparse population. To keep a constant lookout, would be more than a driver could do, even if he were continually standing and driving on a walk. Yet to this the matter must come, if he is to take all the responsibility. The roads would thus become of very little use in the line for which they were principally intended. It seems to me, that the defendants exercised all the care which, in the nature of this case, the law required. If so, it is a case of mere unavoidable accident; for which they are not liable. *Dygert v. Bradley*, 8 Wendell, 469, 472, 473; *Clarke v. Foote*, 8 Johns. R. 421; *Penton v. Holland*, 17 id. 92.

Was the *plaintiff* guilty of negligence? His counsel seemed to think he made a complete exception to the general rule demanding care on his part, by reason of his extreme infancy. Is this indeed so? A snow path in the public highway, is among the last places in this country to which such a small child should be allowed to resort, unattended by any one of suitable age and discretion. The custody of such a child is confided by law to its parents, or to others standing in their place; and it is absurd to imagine that it could be exposed in the road, as this child was, without gross carelessness. It is the extreme of folly even to turn domestic animals upon the common highway. To allow small children to resort there alone, is a criminal neglect. It is true that this confers no right upon travelers to commit a *voluntary injury* upon either; nor does it warrant *gross neglect*; but it seems to me that, to make them liable for anything short of that, would be contrary to law. The child has a right to the road for the purposes of travel, attended by a proper escort. But at the tender age of two or three years, and even more, the infant cannot personally exercise that degree of discretion, which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case. It is perfectly well settled, that, if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels. *Rathbun v. Payne*, 19 Wendell, 399; *Burckle v. N. Y. Dry Dock Co.*, 2 Hall, 151, which can scarcely be said of a toppling infant, suffered by his guardians to be there, either as a traveler or for the purpose of pursuing his sports. The application may be harsh when

made to small children, as they are known to have no personal discretion. Common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule, when they bring an action for redress; and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect. Suppose a hopeless lunatic suffered to stray by his committee, lying in the road like a log, shall the traveler, whose sleigh unfortunately strikes him, be made amenable in damages? The neglect of the committee to whom his custody is confided shall be imputed to him. It is a mistake to suppose that because the party injured is incapable of personal discretion, he is, therefore, above the law. An infant or lunatic is liable personally for wrongs which he commits against the person and property of others. *Bullock v. Babcock*, 3 Wendell, 391, 394. And when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong. *Volenti non fit injuria*. If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travelers and then harass them in courts of justice, recovering heavy verdicts for his own misconduct.

The counsel for the plaintiff probably have the advantage of saying that the neglect of an infant has not, in any reported case, ever been allowed by way of defense in an action for negligently injuring him. But so far, there is an equal advantage on the other side. The defense has not been denied in any book of reports. The defendant has also another advantage. The reports expressly say that negligence may be predicated of an infant or lunatic. All the cases agree that trespass lies against an infant. That was adjudged in *Campbell v. Stakes*, 2 Wendell, 137, and *Bullock v. Babcock*, before cited. And it is equally well settled that where an injury is free from all negligence, as if it arise from inevitable accident, there trespass does not lie. *Weaver v. Ward*, Hob. 134; MARCY, J., in *Bullock v. Babcock*, 3 Wendell, 393; *Dygert v. Bradley*, before cited. The cases maintaining trespass against an infant, therefore, imply that he may be guilty of negligence. Trover will also lie for a mere non-feasance, *e. g.*, a non-delivery of goods, where they do not come to the infant's hands by contract. LAWRENCE, J., in *Jennings v. Rundall*, 8 T. R. 337; *Campbell v. Stakes*, 2 Wendell, 143. The cases most favorable to infants all agree in that. And so, where the contract

of bailment to an infant has expired, it was agreed that, on non-delivery, the owner may maintain detinue, replevin, or trover. *Penrose v. Curren*, 3 Rawle, 351. And see *per* ROGERS, J., *id.* 354. It was said trespass lies against an infant, though only four years of age; 25 Hen. 6, 11 b. *per* Wangford, though this is put by Brooke with a *quære*. Br. Abr. Corone pl. 6. No doubt, however, he may bring a suit at any age; and if that suit depends upon a condition on his side, he must show that it was performed. It was said in *Stowel v. Zouch*, Plowd. Com. 364, if an infant lord, who has title to enter for mortmain, does not enter within the year, he shall be bound by his laches; "for there he had but title to a thing which never was in him." To warrant an action he must have entered within the year; and not having done so, he could have no remedy. Several like instances are put in the same page, which are also collected and arranged in 9 Viner's Abr. Infant, (B. 2,) pl. 7, 8, p. 376, of the octavo ed. But it is plain in the nature of things, that, if an infant insist on a right of action, he must show a compliance with the conditions on which his right is to arise; and this is entirely irrespective of his age. Land descends to an infant of a year old; and he is bound to make a share of the partition fence. He neglects to do so, whereby his neighbor's cattle enter and trespass upon the land. No one would think of contending that his neighbor must, therefore, be deprived of his defense. The infant has neglected to fulfill the condition, on which he could sue, or his guardian has done so, which is the same thing. He might as well sue because his neighbor had left a gate on his own premises open, through which the infant had crept, and fallen into a pit and hurt himself. The man has a right to keep his gate open; and the child's parents must keep him away. But one has no plainer right to walk about his own premises, and open and shut his own gates, than he has to travel in the highway with his horses. An infant creeps into the track from your field to your barn, and is injured by your driving a load of hay along the path, are you to be deprived of all excuse in an action for the injury?

The argument for this plaintiff goes quite too far and proves too much. It was said that drivers are bound to suppose that small children may be in the road, and as all the care lies on the side of the former, damages follow of course for every injury to the latter. Suppose an infant suddenly throws himself in the way of a sleigh, a wagon or a railroad car, by which his limb is fractured; it may be said with equal force, he is incapable of neglect. So if he be allowed to travel the road alone in the dark. The answer to all this is, the law has placed infants in the hands of vigilant and generally affectionate keepers, their own parents; and if there be any legal responsibility in damages, it lies upon them. The illustration sought to be derived from the law in respect to the injury of animals turned or suffered to stray into the street, does not

strike me as fortunate. If they be there without any one to attend and take care of them, that is a degree of carelessness in the owner which would preclude his recovery of damages arising from mere inattention on the side of the traveler. Indeed, it could rarely be said that animals entirely unattended are lawfully in the roads or streets at all. They may be driven along the road by the owner or his servants; but if allowed to run at large for the purpose of grazing, or any other purpose, entirely unattended, and yet travelers are to be made accountable in all cases of collision, such a doctrine might supersede the use of the road, so far as comfort or expedition is concerned. The mistake lies in supposing the injury to be wilful, to arise from some positive act, or to be grossly negligent. Such an injury is never tolerated, be the negligence on the side of the party injured what it may. *Clay v. Wood*, 5 Esp. R. 44; *Rathbun v. Payne*, before cited. But where it arises from mere inadvertence on the side of the traveler, he is always excused by the law on showing that there was equal or greater neglect on the side of his accuser. It is impossible to say, then, that the accuser was not himself the author of the injury which he seeks to father upon another. My difficulty in the case at bar is to find the least color for imputing gross negligence, or indeed any degree of negligence to the defendants. But if there were any, there was, I think, as much and more on the side of the plaintiff.

It therefore seems to me, that here was a good defense established at the trial, on the ground that the defendants being free from gross neglect, and the plaintiff being guilty of great neglect on his part, indeed being unnecessarily, not to say illegally occupying the road, having no right there, (for he does not appear to have been traveling, nor even on the land which belonged to his family,) the injury was a consequence of his own neglect, at least such neglect as the law must impute to him through others.

Again; I collect from the evidence that Newell had demised the team for a term of two years, which was unexpired at the time of the injury, to his son-in-law and co-defendant, Roper. Newell then had no control of the team, and cannot be made liable without proof of positive and active concurrence in the injury, a thing for which there is no pretense in the proof, and which implies a barbarous temper, which the law cannot presume in any one. He, at least, should have been acquitted by the jury. He neither actually participated in the management of the team, nor could his interference have been legally efficient to prevent mischief. He had no lawful control of the horses. Roper was the exclusive owner *pro hac vice*.

The evidence, at the time when the motion was made to allow the jury to pass upon the case of Newell, had made out nothing actual against him, if Roper, the driver, may be said to have been implicated as a wrong-doer. But Newell might, at this stage, perhaps have been

regarded by the jury as owner of the horses, and Roper as his servant. The lease was not in proof. Constructively, his liability would follow from the neglect of his servant; and in this view it cannot be said there was no evidence against him. It is only where the evidence totally fails as to one whose case can be separated from the other, that he is entitled to be acquitted for the purpose of being sworn as a witness for his co-defendant.

The motion for a nonsuit, which followed, seems to have been the more proper one; for I have been utterly unable to see that, so far, the evidence had made out any neglect, or the semblance of neglect on the part of the defendants, while it had established clear neglect on the other side. But this question has been sufficiently dwelt upon in connection with the defendants' proofs, and that which the plaintiff adduced at the close of the cause. It was enough, if the cause of action was then made out, although the judge might have refused to non-suit. It appears to me it was not.

It follows that a new trial should be granted. The costs should, I think, abide the event; for the judge erred in omitting to nonsuit the plaintiff. The case was certainly not made better for the plaintiff by the subsequent evidence. It is not, therefore, *merely* the case of a verdict against the weight of evidence, which calls for payment of costs.

*New trial granted; costs to abide the event.*¹

NEWMAN V. PHILLIPSBURG HORSE CAR RAILROAD CO.

(52 New Jersey Law, 446.—1890.)

THE plaintiff, a child two years of age, was in the custody of her adult sister, and, being left by herself for a few minutes, got upon the track of the defendant and was injured by one of its cars. At the time of the accident, which took place in one of the streets of Phillipsburg, no one was in charge of the horse car, the driver being in the car, collecting fares.

The Circuit Judge submitted the following to this court for advisement

1. Whether the negligence of the persons in charge of the plaintiff, a minor, should be imputed to her.

¹ "If a child is capable of exercising the care that is required of an ordinarily prudent person of full age, and such child does exercise such care, the suggestion of negligence on the part of the parents imputable to the child is wholly negated. The imputed negligence of the parents is wholly based upon the inability of the child to exercise the care and prudence of an adult." *Serano v. N. Y. Cen., Etc., R. R. Co.*, 188 N. Y. 156, 165.

2. Whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of, was not so demonstrably negligent that the said Circuit Court should have non-suited the plaintiff, or that the court should have directed the jury to find for the defendant.

3. Whether a new trial ought not to be granted, on the ground that the damages awarded are excessive.

Beasely, C. J. There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law.

The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hatfield v. Rofer & Newell*, reported in 21 Wend. 615. This case appears to have been one of the first impression on this subject, and it is to be regarded, not only as the precursor, but as the parent of all the cases of the same strain that have since appeared.

The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to, for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was, that as the child was permitted by its custodian to wander into a position of such danger it was without remedy for the hurts thus received, unless they were violently inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that, consequently, by force of the well known rule, under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such infliction is justified in the case cited in this wise: "The infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant; his neglects the infant's neglects."

It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it, the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is, conspicuously, *a non sequitur*. How does the custody of the infant justify, or lead to, the imputation of

another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in *Wendell* it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burthen upon it. If a mother traveling with a child in her arms should agree with a railroad company, that in case of an accident to such infant by reason of the joint negligence of herself and the company the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds—*first*, the contract would be *contra bonos mores*, and, *second*, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother in the absence of such supposed contract, as would have resulted if such contract should have been made and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself, is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: "The common principle is, that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances, that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will

of its creator. But in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control or remove him, and the injustice, therefore, of making the latter responsible, in any measure whatever, for torts of the former, would seem to be quite evident. Such subjectively would be hostile, in every respect, to the natural rights, of the infant, and, consequently, cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, you and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress; but when such wrongdoer says to the infant, your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone, a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this, an infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being, that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice, nor hardship, in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance.

Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity follow that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinion, touching the subject just discussed, is in a state of direct antagonism, and it would, therefore, serve no useful purpose to refer to any of them. It is sufficient

to say, that the leading text writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tort-feasor by imputation. 1 Shearman. & R. Neg. § 75; Whart. Neg. § 311: 2 Wood Railw. L. p. 1284.

In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the Circuit Court be advised to render judgment on the finding of the jury.

STONE v. DRY DOCK, ETC., Co.

(115 New York, 104.—1889.)

ACTION to recover for the death of plaintiff's intestate, a child about seven years of age. The plaintiff was nonsuited; the General Term of the Supreme Court affirmed the judgment entered upon the order of the lower court; and the plaintiff now appeals.

ANDREWS, J. The nonsuit was placed on the ground that an infant seven years of age was *sui juris*, and that the act of the child in crossing the street in front of the approaching car was negligence on her part, which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury.

The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal Street at its intersection with Orchard Street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Railroad Co. v. Bladman*, 15 Wall. 401. It cannot be asserted as a proposition of law that a child just passed seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. *Kunz v. City of Troy*, 104 N. Y. 344. Infants under seven years of age are deemed incapable of committing crime, and by the common law such incapacity presumptively continues until the age of fourteen. An infant between those ages was regarded as within the age of possible discretion, but on a criminal charge against an infant between those years the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent. 1 Arch. 11. The Penal Code preserves the rule of the common law except that it fixes the age of twelve instead of fourteen as the time when the presumption of incapacity ceases. Penal Code, §§ 18, 19.

In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant three or four years of age could not be regarded as *sui juris*, and the same was said in another case of an infant five years of age. *Mangam v. Brooklyn R. R.*, *supra*; *Fallon v. Central Park, N. & E. R. R. Co.*, 64 N. Y. 13. On the other hand, it was said in *Cosgrove v. Ogden*, 49 N. Y. 255, that a lad six years of age could not be assumed to be incapable of protecting himself from danger in streets or roads, and in another case that a boy of eleven years of age was competent to be trusted in the streets of a city. *McMahon v. Mayor, &c.*, 33 N. Y. 642. From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material unless the child is of so very tender years that the Court can safely decide the fact. The trial Court misapprehended the case of *Wendell v. New York Central Railroad Company*, 91 N. Y. 420, in supposing that it decided, as a proposition of law, that a child of seven years was capable of exercising judgment so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was in question was capable of understanding, and did understand the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight, and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman while attempting to cross the track in front of an approaching train, and had been warned of the danger. The Court held, upon this state of facts, that the boy was guilty of culpable negligence. But the case does not decide, as matter of law, that all children of the age of seven years are *sui juris*.

We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle now well settled in

this State, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action. In the present case the only fact before the jury bearing upon the capacity of the child whose death was in question was that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts in such a case. *Thurber v. Harlem, B. M. & F. R. R. Co.*, 60 N. Y. 335.

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Judgment reversed.

BATCHELOR V. DEGNON REALTY, ETC., Co.

(131 Appellate Division, 136.—1909.)

GAYNOR, J. The plaintiff was five years old when injured. The defendant was running its dirt cars, such as are used by contractors, along Middleburg avenue on a temporary track. Moore street does not cross Middleburg avenue, but runs into it at or near right angles and ends there. A train of these cars was standing with its rear at Moore street. The plaintiff was crossing Middleburg avenue at Moore street, and as he got on the defendant's tracks and about six feet in the rear of the said train it was suddenly backed up and ran over him. On these facts a non-suit was granted. This was error, for the defendant owed the duty of care, and there was no evidence that there was any one at the crossing or at the rear of the train, or anywhere, to look out for people crossing, or any evidence on that head.

The court could not rule as matter of law that the plaintiff was guilty of contributory negligence. In *Tucker v. N. Y. C. & H. R. R. R.*, 124 N. Y. 308, the case of an infant a little over twelve years of age, the court, after a full discussion of the age, at which a child may as matter of law be presumed *sui juris* in a case like this, concluded as follows: "But in the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*."

The opinion throughout fixes twelve years as the age before which an infant will not be and after which he will be deemed *sui juris* as matter of law, unless the contrary be proved. In the case of an infant plaintiff under twelve the plaintiff would have no reason to prove him *sui juris*, but the contrary, and in the case of an infant plaintiff of twelve or over the defendant would have no reason to prove him *non sui juris*, but the contrary, so that it would seem plain on which side, the necessity of proof would lie on each case, assuming the legal presumption to be as stated in the absence of any evidence on the subject except that of age. In *Zwack v. N. Y., L. E. & W. R. R.*, 160 N. Y. 365, the case of a ten-year-old boy, the case of *Tucker* is mentioned with apparent full approval, as follows: "The reasoning of the court in the case of *Tucker v. N. Y. C. & H. R. R. R.*, 124 N. Y. 308, is to the effect that an infant under the age of twelve years is presumed to be *non sui juris*, so the question with respect to his capacity at that age becomes one of fact. It is true that an infant, even of more tender years, may be shown to be *sui juris*. The fact must in such cases depend upon the capacity and intelligence of the child, and hence becomes a question for the consideration of the jury in connection with all the facts and circumstances of the case." And the case before the court was then disposed of on this basis. Now, if the law be as stated in the foregoing quotation, that the law presumes a child under twelve years to be *non sui juris* unless the contrary be proved, the rule would seem to be deducible that it is for the defendant to make such proof in order to avoid such legal presumption, and in the same way, that it is for the plaintiff to show that an infant plaintiff over twelve is *non sui juris*, and such deduction has been made. *Hill v. Baltimore & N. Y. R. R.*, 775 App. Div., 325; *McDonald v. Metropolitan St. Ry.*, 80 App. Div. 233; *Gerber v. Boorstein*, 113 App. Div. 808. In the *McDonald* case, Mr. Justice HATCH stated the case clearly as follows: "In the case of infants under the age of twelve years the burden of proof is upon the defendant to show the possession by such infant of sufficient mental capacity to understand, appreciate and guard against the situation in which it is placed, and the plaintiff may rest in respect of such question upon the legal presumption which protects the infant from the imputation of negligence, unless it be a case where the negligence of the infant is imputable to the parent. When an infant is twelve years of age or above, the burden is upon the plaintiff to show the mental capacity of the infant and establish as a fact that such infant was not possessed of sufficient mental capacity to exercise the degree of care and caution which is chargeable upon an adult, and it then becomes a question for the jury to determine whether the degree of care exercised in the particular case was such as to exonerate the infant from the charge of contributory negligence measured by its age and capacity."

But in the very recent case of *Simkoff v. Lehigh Valley R. R.*, 190 N. Y. 256, where the plaintiff was an infant seven years old, the reverse is explicitly held, viz., that there was no legal presumption that he was *non sui juris*, but that the burden was on the plaintiff to show that he was *non sui juris*. And says the court for a general rule: "The establishment of the fact that an infant is *non sui juris* to the satisfaction of the jury, if considered material, is as much a part of the plaintiff's case as any other evidence is upon which he relies to make out a case for recovery;" and it is stated that that court had never decided to the contrary. The understanding of its said former decisions must therefore now be corrected and abandoned.

The infant plaintiff here was only 5 years old, yet I do not venture to suggest to the court, in view of the foregoing, that the law presumes him to be *non sui juris*. The most that it seems to be safe to say, so as not to cause anything to be done on the trial to jeopardize the verdict for the plaintiff, if he obtain one, is that at all events the question of his degree of intelligence and capacity, and therefore of his contributory negligence, was not for the court but for the jury. I do not see how this court can go wrong in saying at least that much. The question whether his age alone does not give rise to a presumption that he is *non sui juris*, on which the plaintiff could safely rest, might seem to be plain enough, but it can be avoided without detriment to the plaintiff's case by leaving the whole question to the jury. A child has to be judged as a child. A child may only be held to the exercise of that degree of care which one of his years and intelligence can be expected and required to exercise. There must be an age when a child is so young, and immature that no rule of care can be applied to it and the jury may properly be so instructed; but we now know that such age is not fixed in years in this State even as a presumption of fact capable of being modified or rebutted by evidence, but is variable, and generally for the jury. Nevertheless, there must be cases so obvious and indisputable that it would not be error for the trial judge to decide them as matter of law, although a jury could decide just as well that a toddling child was *non sui juris* for instance. Between such a state of immaturity and that state of maturity to which the rule of care applicable to all adults becomes applicable is a wide zone and those in it are to be judged by the jury according to their age, maturity and intelligence on the question of their negligence. Some think that it were better if the phrases *non sui juris* and *sui juris* were dropped altogether in the restricted and uncertain sense in which they have been used in respect of children plaintiffs in actions for damages for negligence.

The judgment should be reversed.

All concur.

FRAUD AND DECEIT

ESSENTIAL ELEMENTS.

PASLEY V. FREEMAN.

(3 Term Reports, 51.—1789.)

THIS was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: “And whereas, also, the said Joseph Freeman afterwards, to wit, on the twenty-first day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of £2,634 16s. 1d. upon trust and credit; and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley and Edward that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect; and did thereby falsely, fraudulently, and deceitfully cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; and, in fact they the said John Pasley and Edward, confiding in, and giving credit to, the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the 28th day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; whereas in truth and fact, at the time of the said Joseph’s making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the

said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of § 2,634 16s. 1*d.* last mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandises; but, on the contrary, the said John Christopher then was and still is wholly unable to pay the said sum of money last-mentioned, or any part thereof, to the said John and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation the said John Christopher was not a person safely to be trusted or given credit to in that respect, as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid, to the damage," &c.

Application was first made for a new trial, which after argument was refused, and then this motion in arrest of judgment.

GROSE, J. Upon the face of this count in the declaration no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood, by saying that Falch might be safely intrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive by which the third person was damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognizes principles on which it may be supported. The principle upon which it is contended to lie is that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert, and shall endeavor to show that, in every case where deceit or falsehood is practiced to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for

the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground that there exists in this case what the law deems *damnum cum injuria*. If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been damnified. But whether there has been *injuria*, a wrong, a tort, for which an action lies, is a matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. *Deceit*, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past. For I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others; and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put. Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when in fact the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller, and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant has said, "If he do not pay for the goods, I will;" for then undoubtedly an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out of any principle upon which this can be supported,

and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases, in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation is that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; *Bayly v. Merrel*. In *Harvey v. Young*, Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave £150, and afterwards could not get more than £100 for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Roll. Abr. 101, are recognized in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a *dictum*. But from the cases cited some principles may be extracted to show that it cannot be sustained; 1st. That what is fraud, which will support an action, is matter of law. 2d. That in every case of a fraudulent misrepresentation, attended with damage, an action will not lie even between contracting parties. 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the

declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit; but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own, to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in *Yelverton* respecting the value of the term. But at any rate, it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this the plaintiffs might have inquired of others who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly v. Merrel*. I am, therefore, of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

BULLER, J. The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And a question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per CROKE, J., 3 Bulst. 95. But it is contended that this was a bare, naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel, who originally made the motion, that no action could be maintained unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare, naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie, but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the Courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 193, and all other cases which relate to freehold interests in lands; for they go on the

special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are Yelv. 20, Carth. 90, Salk. 210. The first of these has been fully stated by my brother Grose; but it is to be observed that the book does not affect to give the reasons on which the Court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the Court went on a distinction between the words "warranty" and "affirmation," the case is not law; for it was rightly held by HOLT, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended. But the true ground of that determination was that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment, or opinion, in such case implies no knowledge. And here this case differs materially from that in Yelverton; my brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in Yelverton admits that, if there had been fraud, it would have been otherwise. The case of *Crosse v. Gardner*, Carth. 90, was upon an affirmation that oxen which the defendant had in his possession and sold to the plaintiff were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. *Ex concessis* therefore if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the Court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of *Medina v. Stoughton*, Salk. 210, in the point of decision, is the same as *Crosse v. Gardner*; but there is an *obiter dictum* of HOLT, C. J., that where the seller of a personal thing is out of possession, it is otherwise; for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by HOLT is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be

any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases, then, are so far from being authorities against the present action, that they show that if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney v. Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated; nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And, by the words of the book, it seems that if the tenant had said the same thing he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A., by fraud and deceit, cheat B. out of £1,000, it makes no difference to B. whether A. or any other person pockets that £1,000. He has lost his money; and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B. buys them, when in truth they are the goods of another, yet, if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of the stranger, yet B. shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person; what is said at the end of the case only proves that "falsely" and "fraudulently" are equivalent to "knowingly." If the first were the fact in the case, namely, that he had no authority, the case does

not apply to this point; but if he had an authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For in 1 Roll. Abr. 100, pl. 1, it was held that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name of my land, this shall bind me forever; and therefore I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary it would have been so stated, but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, l. 25, it is said, "If my servant lease my land to another for years, reserving a rent for me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances, if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty." Here, then is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425; but no notice is taken of this point, probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that if there were any fraud, the nature of it is not stated. To this the declaration itself is so direct an answer that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here, then, is the fraud and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so; by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man who is asked a question respecting another's responsibility

hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for; it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs v. Barnard*, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In *R. v. Gunston*, 1 Str. 589, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the Court refused to grant a *certiorari*, unless a special ground were laid for it. If the assertion in that case had been wholly innocent the Court would not have hesitated a moment. How, indeed, an indictment could be maintained for that I do not well understand; nor have I learnt what became of it. The objection to the indictment is that it was merely a private injury: but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt*.

ASHHURST, J. The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with

the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by CROKE, J., in *Bayly v. Merrel*, 3 Bulstr. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity, against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had before this event subsisted a partnership between him and Falch which had been dissolved; but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action, as in *Risney v. Selby*, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not hesitate to say that it could not be law, for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it; what is it to the plaintiff whether the defendant was or was not to gain by it? The injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical, if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man may have an action brought against him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows; for in order to make it actionable it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending to deceive and defraud the plaintiffs, did deceitfully encourage and

persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon; for the *quo animo* is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence, as it was two centuries ago; if it were not, we ought to blot out of our law-books one fourth part of the cases that are to be found in them. The same objection might, in my opinion, have been made with much greater reason in the case of *Coggs v. Barnard*; for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And indeed the principle of the case does not, in my opinion, seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.¹

MAHURIN V. HARDING.

(28 New Hampshire, 128.—1853.)

TRESPASS on the Case. The declaration was as follows:

In a plea of trespass on the case, for that the said J. & J. (defendants) on &c., at &c., being possessed of one mare, of a dark brown color, which mare was unsound and infected with a bad and inveterate disease, commonly called glanders, which rendered the said mare good for nothing; and the plaintiff being then and there also possessed of another mare, of a bay color, of his own proper mare, of the value of \$100; the defendants, to induce the plaintiff to exchange with them, did then and there falsely and fraudulently affirm to the plaintiff that their, the said defendants', mare was then well, good and sound, with the exception of "a slight touch of the heaves;" whereupon the plaintiff, giving full credit

¹ Opinion by Lord Kenyon, Ch. J., omitted.

to said defendants' said affirmation, was instantly induced to and did then and there deliver his said bay mare to the defendants in exchange for said defendants' brown mare as aforesaid; and the defendants did then and there deliver their said brown mare to the plaintiff in exchange for the plaintiff's said bay mare, and also did then and there give to the plaintiff one sucking colt, of the value of twenty dollars, and also gave to the plaintiff one joint and several note for thirty dollars, and one other joint and several note for five dollars, as boot between said mares. Now the plaintiff in fact says, that the defendants' mare aforesaid was not at the time of the delivery, exchange and affirmation aforesaid, well, sound or good; but that said mare was then and there infected with and labored under a bad and inveterate disease, called glanders, as aforesaid, which made said mare utterly unfit for any service and good for nothing, and soon after died of the said glanders, as aforesaid; of all which the said defendants were then and there well knowing. And so the said defendants, by means of their said false affirmation, have greatly injured and defrauded the plaintiff, to his damage, &c.

Upon the trial on the general issue, the court instructed the jury that the plaintiff must prove that the affirmation was both false and fraudulent, that in this State the defendant is liable to arrest for a fraudulent affirmation, by which the plaintiff has suffered damage, but not for a mere breach of contract, and that in other respects the distinction between tort and contract is material and should be regarded, and therefore if they found that the defendants stated as a fact for the plaintiff to rely upon, that the mare was sound (with the exception named in the writ), and found that she was not sound; yet if the defendants made this statement in entire good faith, fully believing it to be true, they are not liable in this form of action; but if the affirmation was known, or believed or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent.

The jury found a verdict for the defendants, which the plaintiff moved to set aside because of said instructions.

BELL, J. The declaration in this case is in trespass on the case for deceit in a sale.

It is said in some of the books that assumpsit and case for deceit are in certain cases concurrent remedies for the same injuries in the sale of horses; and to some extent this is true.

Where a seller is chargeable upon an implied warranty of title, or where he makes an express warranty, or makes such statements as to the quality of the article he sells as he intends the purchaser shall rely upon, and which in law constitute a warranty; *Morrill v. Wallace*, 9 N. H. Rep. 111; *Whitney v. Sutton*, 10 Wend. 413; *Cook v. Mosely*, 13 Wend. 277; while at the same time he knows them to be false, and in-

tends by them to deceive and impose upon the purchaser, the buyer may seek his redress either by action of assumpsit upon his warranty, or by action of deceit for the fraud. *Stuart v. Wilkins*, Doug. 21; *Williamson v. Allison*, 2 East. 446; *Wallace v. Jarman*, 2 Stark. 162; *Wardell v. Davis*, 13 Johns. 325; *Cravens v. Grant*, 4 Mon. 126; 2 Stephen's N. P. 1285.

The warranty is none the less a contract because it is the means by which a fraud is accomplished, and the fraud is in no way diminished, because the seller has at the same time bound himself by a warranty.

But these remedies, though concurrent, and though they entitle the sufferer to the same measure of redress in damages, are by no means identical. The distinction between the two classes of actions, as being founded respectively on tort and on contract, is nowhere neglected or disregarded. There are substantial differences at common law, and, as remarked by the learned judge who tried this case, in his charge to the jury, the distinction is not merely formal, but in the present state of our law there is a substantial difference, which must not be overlooked. In tort, here, there is a remedy against the person, which ordinarily does not exist in actions on contracts.

The forms of declaring in these cases are substantially different. The declaration in assumpsit always states a consideration and a promise or warranty, and complains of a breach of the warranty. 1 Ch. Pl. 99; Saund. Pl. and Ev. 111; *Carley v. Wilkins*, 6 Barb. S. C. 557; *Edick v. Crim*, 10 Barb. S. C. 445. The contract to warrant, of the breach of which the plaintiff complains, and the entire consideration for it, is indispensable to be stated. *Miles v. Sheward*, 8 East, 7; *Webster v. Hodgkins*, 5 Foster's Rep. 128.

In this action the allegations very often introduced, that the defendant intended to defraud, that he knew his warranty to be false, and that he thereby deceived and defrauded the plaintiff, are immaterial, and need not be proved. The defendant is bound to answer for his false warranty, whether he knew it to be false or not; whether he intended a fraud, or acted with entire good faith, and fully believed it to be true. *Denison v. Ralphson*, 1 Vent. Rep. 366; *Northcote v. Maynard*, 3 Keb. 807; *Anon. Lofft*, 146; *Gresham v. Postan*, 2 C. & P. 540; *Bayard v. Malcom*, 1 Johns. 453; 2 Johns. 550; *Case v. Boughton*, 11 Wend. 107; *Carly v. Wilkins*, 6 Barb. S. C. 557.

The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty or by statements which he knew to be false, and thereby deceived and defrauded him. *Evertson v. Miles*, 6 Johns. 138; *Case v. Boughton*, 11 Wend. 107; *Carley v. Wilkins*, 6 Barb. S. C. 557; *Edick v. Crim*. 10 Barb. S. C. 445. And this is all that is essential to be alleged. *Barney v. Dewey*, 13 Johns. 224; *Weeks v. Burton*, 7 Vt. Rep. 67. It is not necessary to make any allega-

tion in relation to the consideration or the terms of the contract of sale, unless they happen to be connected with the fraud alleged, in that case, though if a party incautiously recites the particulars of such a contract he may be compelled to prove them as he states them, and may fail if any material variance occurs in his proof. *Weall v. King*, 12 East, 452; *Jones v. Cowley*, 4 B. & C. 446; *Hands v. Burton*, 9 East, 349; *Morris v. Littlegoe*, 2 Smith, 394; *Blyth v. Bampton*, 3 Bing. 472; *Webster v. Hodgkins*, *ub. sup.*; *Hart v. Dixon*, 1 Sel. N. P. 104; 2 N. H. Rep. 291; *Barney v. Dewey*, 13 Johns. 224; *Corwin v. Davidson*, 9 Cow. 22; *Porter v. Talcott*, 1 Cow. 359.

But the intention to defraud, the knowledge that his warranty or his statements were false, and the fact that the plaintiff was thereby defrauded, constitute, in cases of this kind, the very gist and foundation of the action for deceit and they must be proved or the action must fail. *Springwell v. Allen*, Aleyn, 91; *Parkinson v. Lee*, 2 East, 313; *Dowling v. Mortimer*, 2 East, 449 n.; 2 Stark. Ev. 266; 2 St. N. P. 1286; *Dale's case*, Cro. El. 44; *Turner v. Brent*, 12 Mod. 245; 1 Com. Dig. Action for Deceit, A. 8, A. 11, E. 4; *Evertsen v. Miller*, 6 Johns. 138; *Young v. Covell*, 8 Johns. 23; *Addington v. Allen*, 11 Wend. 375.

A seller may in good faith make statements as to the qualities of the articles he sells, believing them to be true, and intending that the purchaser should rely upon them, either in the form of explicit warranties, or of such representations as in law constitute warranties, and the purchase may be made in reliance upon their truth; but the seller is guilty of no fraud or deceit, for bad faith and a design to deceive are essential elements of every fraud, or deception; and though he may be liable upon his warranty, yet no action, founded on fraud or deceit, will lie in such case. *Stone v. Denny*, 4 Met. 151; *Rubber Co. v. Adams*, 23 Pick. 256; *Emerson v. Brigham*, 10 Mass. Rep. 197; *Kingsbury v. Taylor*, 29 Maine Rep. 508; *Hazard v. Irwin*, 18 Pick. 95; *Shrewsbury v. Blunt*, 2 M. & G. 475; *Freeman v. Baker*, 5 B. & As. 797; *Page v. Bent*, 2 Met. 371.

It is on this principle that it has in many cases been made a serious question, what form of allegation was sufficient distinctly to express this charge. *Chandler v. Lopus*, Cro. Jac. 4; *Medina v. Stoughton*, 1 Salk. 210; s. c. 1 Ld. Ray. 593; *Leakins v. Chissell*, Sid. 146; *Northcote v. Maynard*, 3 Keb. 807; *Cross v. Garnett*, 3 Mod. 261; *Warner v. Tallard*, Rolle's Ab. 91; *Elkins v. Tresham*, 1 Lev. 102; 1 Bac. Ab. 80; *Bayard v. Malcom*, 1 Johns. 453; 2 Johns. 550; *Lynsey v. Selby*, 2 Ld. Tay. 1118; *Harding v. Freeman*, Sty. 310; s. c. 1 Rolle's Ab. 91; 1 Com. Dig. Action for Deceit, F. 3, E. 4.

If by the exercise of some ingenuity a declaration could be drawn in such a form that it may seem doubtful whether it is designed to be founded on tort or on contract, and not entirely defective if regarded as either the one or the other, yet it must be held to be founded either

in tort or in contract. It cannot be considered as having a double aspect or character, or being either the one or the other, as the exigencies of the case may from time to time happen to require. To allow it such a double character would be contrary to the whole theory of the common law, and would make it a perfect anomaly in legal proceedings.

In former times, the usual form of declaring in actions upon a false warranty, was in case for deceit, in which it was more commonly alleged that the defendant *warrantizando vendidit* an article as sound, well knowing that it was not so, though declarations in assumpsit were not uncommon. 2 Inst. Cler. 227; *Butterfield v. Burroughs*, 1 Salk. 211; nor declarations in case without *warrantizando vendidit*. *Firnis v. Leicester*, Cro. Jac. 474; *Roswell v. Vaughan*, Cro. Jac. 196; *Cross v. Garnett*, 3 Mod. 261; *Kendrick v. Burgess*, Mo. 126.

In *Williamson v. Allison*, 2 East, 445, in 1802, in a declaration upon a *warrantizando vendidit*, it was expressly held, that the declaration was in case for deceit, but that by striking out the averment of the scienter, the action might still be maintained in tort, and therefore the scienter was not necessary to be proved. It seems to have been decided upon the authority of a *nisi prius* ruling in a case, where it did not appear whether the action was on contract (where the ruling would have been right, but no authority for the case in hand), or in tort; and it was conjectured it must have been in tort, because such was then the more common form of declaring.

This decision seems to have been since followed in some cases in England. *Gresham v. Postan*, 2 C. & P. 540; and is cited in most of the elementary English books on the subject.

It has been followed in Vermont and some of the other States, and has been made the basis of a theory that in actions for deceit in the sale of personal property, if any express warranty is proved, it is not necessary to prove the scienter, or any allegation that the false warranty or affirmation was made with any design to deceive. But this idea is not supported by the decision in *Williamson v. Allison*, which is expressly limited to a declaration upon a *warrantizando vendidit*.

See 3 Vt. Rep. 53; 10 Vt. Rep. 457; 17 Vt. Rep. 583.

The English case is without authority here, and seems to us entirely unsupported by any authority at common law. And it seems to us entirely inconsistent with the doctrines of the common law to hold that an action for deceit can be sustained without evidence of the intention to deceive. It would be unjustifiable to hold that a man may be imprisoned on execution in an action for a tort, where a court should hold no proof need be produced but of an express contract. In the case of *Crooker v. Willard* (Sullivan, July Term, 1851), it was held that a count alleging a deceit in a sale in the same form as in *Williamson v. Allison*, could not be joined with one on contract, so far, agreeing with

that case. But that decision is entirely irreconcilable with the case of *Vail v. Strong*, 10 Vt. Rep. 457, that such a declaration has a double aspect, which makes it join well with assumpsit or trover. And the same view of such a declaration was taken in *Webster v. Hodgkins*, *supra*. With those decisions we remain entirely satisfied.

The present case has a declaration framed upon a different principle. It could not be supported as a declaration on a warranty, on any idea of rejecting the allegations importing a charge of fraud, if the cases referred to were not questioned.

It sets forth, that the defendants being possessed of a horse, which was unsound, and the plaintiff of another, of value, the defendants, to induce the plaintiff to exchange with them, did falsely and fraudulently affirm to him, that their horse was sound, and the plaintiff giving credit to their affirmation was induced to exchange, and did so, whereas the defendants' horse was not sound, &c., which they well knew, and so the defendants, by their false affirmation, have greatly injured and defrauded the plaintiff.

This is a common form of declaring in case for deceit. It has no feature of a declaration in assumpsit. It contains no promise, nor undertaking, nor consideration for any. It complains of no breach of any contract, or warranty. It does not even speak of any warranty. Its gist and substance is that the defendants, by their false and fraudulent affirmation, have defrauded the plaintiff, and not by any breach of contract. Assuredly no court could hold that such a declaration was proved by any evidence which did not establish the fact of fraud, of an intention to deceive, carried into effect by statements known to be false.

As, then, the allegation that the defendants well knew their horse to be unsound, was essential to be inserted in the declaration, either in direct terms, or in expressions of equivalent import, and necessary to be proved, the charge of the court below was entirely correct, and there must be

Judgment on the verdict.

REPRESENTATIONS.

LONG v. WOODMAN.

(58 Maine, 49.—1870.)

DECERT. Plaintiff declared that defendant and one Reed induced him to convey certain real property to them, by lending plaintiff a certain sum of money; that they said they would execute and deliver to him a bond to secure a reconveyance of the property, upon payment by him of the loan with interest; that intending to deceive the plaintiff they

subsequently refused to execute and deliver said bond; and that he tendered the amount of the loan, with interest, but they refused to reconvey said property.

The special demurrer to the declaration was sustained, and the plaintiff excepted.

APPLETON, C. J. . . . To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions, in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts or to the condition of things as then existent. It is not every misrepresentation, relating to the subject-matter of the contract, which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation. *Hazard v. Irwin*, 18 Pick, 95. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment may be unsound; the expected contingency may never happen; the expectation may fail. An action of tort, for deceit in the sale of property, does not lie for false and fraudulent representations concerning profits that may be made from it in the future. *Pedrick v. Porter*, 5 Allen, 324. An action for deceit in the sale of real estate cannot be sustained by proof of fraudulent misrepresentations as to the price paid by the vendor. *Hemmer v. Cooper*, 8 Allen, 334.

So in criminal law, to sustain an indictment for cheating by false pretences, there must be direct and positive assertion as to some existing matter of fact, by which the victim is induced to part with his money or property. A false representation, promissory in its nature, as to pay money or do some other act, has never been held to be the foundation of a criminal charge. *Ranney v. The People*, 22 N. Y. 413. In an indictment for obtaining goods under false pretences, no statement of anything to take place in the future will constitute a pretence within the meaning of the statute. *Glackan v. Com.*, 3 Met. (Ky.) 232. A representation or assurance in relation to a future event is not a statutory false pretence. *State v. Magee*, 11 Ind. 154.

Here the defendant, when or after he obtained his deed, promised "to make, execute, and deliver a good and sufficient bond," to reconvey, upon certain conditions, the land conveyed to him and Reed, which upon request he refused to do. Here is no false representation or concealment of an existent fact. Yet this is the gist of the plaintiff's complaint, that a promise made has not been performed. Had it been performed, the plaintiff had no case.

Here is a promise to do some future act; but whether it be to pay money or give a bond is immaterial. If the promise had been to pay a sum of money instead of giving a bond no action for deceit could have been maintained, though the money was not paid at the stipulated time. This case in no respect differs from a broken promise to pay for goods sold. The goods are delivered upon the expectation that the promise to pay will be performed. The deed was given upon the expectation that the bond would be delivered in accordance with the promise of the grantee.

The declaration sets forth a promise to deliver a certain bond as therein described. It does not state whether it is in writing or not. There is no special plea denying it to be in writing. *Lawrence v. Chase*, 54 Maine, 196. If the promise was in writing, it was for a sufficient consideration, and the plaintiff may maintain an action thereon.

If not in writing it would be void by the statute of frauds. *Lawrence v. Chase*, 54 Maine, 196. But a verbal promise within the statute is no false representation. It is a promise for the violation of which the law fails to provide a remedy in case of its non-performance. In *Fisher v. New York C. P.*, 18 Wend. 608, the facts were somewhat similar to those in the case at bar. The plaintiff below leased certain premises to the defendant, and promised to make repairs thereon, which he refused to do. Mr. Justice COWEN, in delivering the opinion of the Court, uses the following language: "Fraud cannot be predicated of a promise not performed, for the purpose of avoiding a written instrument, or a bargain of any kind. This case is no more. A contrary doctrine would avoid almost every contract for a breach of which a suit is to be brought. I have only to say that the tenant and defendant below were content to take the plaintiff's word. If that was not legally obligatory, then there has been a mistake of the law; but the defendant could not set that up as fraud." The case of *Com. v. Brennerman*, 1 Rawle, 314, resembles the present. In delivering the opinion of the Court, ROGERS, J. says, "There is no doubt that in the breach of promise, Henry Brennerman, in a moral point of view, was guilty of fraud; but it was no more fraudulent than any other breach of trust or promise. There was no false representation or concealment of any existing fact, which constitutes the legal idea of fraud."

Exceptions overruled.

SWIFT V. ROUNDS.

(19 Rhode Island, 527.—1896.)

TILLINGHAST, J. This is trespass on the case for deceit. The first count in the declaration alleges that the defendant, intending to deceive and defraud the plaintiffs, did buy of them on credit certain goods and chattels of the value of \$400, the said defendant not then and there intending to pay for the same, but intending wickedly and fraudulently to cheat the plaintiffs out of the value of said goods and chattels, which said sum of \$400 the defendant refuses to pay, to the plaintiffs' damage, etc. The second count, after setting out the fraudulent conduct aforesaid alleges that the defendant thereby then and there represented that he intended to pay for said goods, but that he did not then and there intend to pay for the same, but wickedly and fraudulently intended to cheat the plaintiffs out of the value of said goods and chattels, etc.

To this declaration the defendant has demurred, and for grounds of demurrer to the first count thereof, he says, (1) that the plaintiffs do not allege any false representation by the defendant; (2) that the plaintiffs do not allege that they have acted upon any false representation of the defendant; and (3) that the plaintiffs do not allege any damage suffered by them in acting upon any false representation of the defendant.

The grounds of demurrer to the second count are, (1) that the plaintiffs do not allege any false representation by the defendant as to any fact present or past, but only as to something that would happen in the future, which, if in the future it proved not to be true, would not be the subject matter of a false representation, but simply a promise broken, and therefore not a ground of an action of deceit; (2) that the plaintiffs do not allege that they acted upon any false representation made by the defendant; and (3) that the plaintiffs do not allege that they suffered any damage by acting upon any false representation made by the defendant to the plaintiffs.

We are inclined to the opinion, after some hesitation, that the declaration states a case of deceit. Any fraudulent misrepresentation or device whereby one person deceives another, who has no means of detecting the fraud, to his injury and damage, is a sufficient ground for an action of deceit. Deceit is a species of fraud, and consists of any false representation or contrivance whereby one person over-reaches and misleads another, to his hurt. And, while the fraudulent misrepresentation relied upon usually consists of statements made as to material facts, either verbally or in writing, yet it may be made by conduct as well. Grinnell on Law of Deceit, p. 35. A man may not only deceive another, to his

hurt, by deliberately asserting a falsehood, as, for instance, by stating that A. is an honest man when he knows him to be a rogue, or that a horse is sound and kind when he knows him to be unsound and vicious, but also by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief, and form the basis of some change of position by him. 1 Story, Eq. Jur. § 192. In *Ex parte Whittaker &c.*, 10 L. R. 449, MELLISH, L. J., says: "It is true, indeed, that a party must not make any misrepresentation, express or *implied*, and as at present advised I think Shackelton when he went for the goods must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown." See also *Lobdell v. Baker*, 1 Met. 201; 1 Benjamin on Sales, ed. of 1888, § 524.

In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words, or even in writing. The plaintiffs had the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the contrary, was made for the purpose of deceiving the plaintiffs into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then, consisted in the making of the promise, in the manner aforesaid, with intent not to perform it. By the act of purchasing the goods on credit, the defendant impliedly represented that he intended to pay for them. The plaintiffs relied on this representation, which was material and fraudulent, and were damaged thereby. All the necessary elements of fraud or deceit therefore were present in the transaction. See *Upton v. Vail*, 6 Johns. 181; *Bartholomew v. Bentley*, 15 Ohio, 666; Bishop, Non-Contract Law, §§ 314-318; *Burrill v. Stevens*, 73 Me. 400; *Barney v. Dewey*, 13 Johns. 226; *Hubbel v. Meigs*, 50 N. Y. 491. The general doctrine which controls this action is fully reviewed by Mr. Wallace in a note to *Pasley v. Freeman*, 2 Smith's Lead. Cas. 101. As said by Bigelow on Fraud, page 484, "to profess an intent to do or not to do when a party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made." See also p. 466 as to what constitutes a representation. In *Goodwin v. Horne*, 60 N. H. 486, the court say: "Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable or can be made the ground of defence. . . . But when a promise is made with no

intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defence. Such are cases of concealed insolvency and purchases of goods with no intention to pay for them." In *Byrd v. Hall*, 1 Abb. A. D. 286, it was held that, although a purchase of goods on credit by one who knows himself to be insolvent is not fraudulent, yet where it is made with a preconceived design not to pay, it is fraudulent. See also *Milliken v. Miller*, 12 R. I. 296; *Thompson v. Rose*, 16 Conn. 81; *Hennequin v. Naylor*, 24 N. Y. 129; *Devoe v. Brandt*, 53 N. Y. 465; Story on Sales, 2d ed. § 176, and cases in note 2; *Douthitt v. Applegate*, 33 Kans. 395; *Morrill v. Blackman*, 42 Conn. 324; *Skinner v. Flint*, 105 Mass. 528; *Earl of Bristol v. Wilsmore*, 2 Dow. & Ry. 760; *Lobdell v. Baker*, 1 Met. 193; Cooley on Torts, 2d ed. 559; *Load v. Green*, 15 M. & W. 215. In short, the making of one state of things to appear, to those with whom you deal, to be the true state of things, while you are acting on the knowledge of a different state of things—among the oldest definitions of fraud in contracts—is exemplified in this case. See *Lee v. Jones*, 17 C. B. N. S. 494. The defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them. And to hold that such a transaction does not amount to fraud, would be to make it easy for cheats and swindlers to escape the just consequence of their unrighteous acts.

We have hesitated somewhat in arriving at the conclusion that an action of deceit will lie, upon the facts set out in the declaration, for the reason that, amongst the numerous cases of fraud and deceit to be found in the books, we have not been referred to any, nor have we been able to find any, where the action of deceit was based simply on the act of buying goods on credit, intending not to pay for them. In *Lyons v. Briggs*, 14 R. I. 224, which was an action of deceit, Durfee, C. J., intimates, however, that deceit would lie in a case like the one before us, by the use of the following language: "It is not alleged that the buyer did not intend to pay when he bought, but only that he falsely and fraudulently asserted that he could be safely trusted." But the authorities are overwhelming to the effect that it is fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may repudiate the sale and reclaim the property, or may sue in trover, or in some other action of tort, for the damages sustained by the fraud. And this being so, we fail to see why an action of deceit, which is an action of tort, based on fraud, may not lie as well. For to obtain goods on credit, intending not to pay for them, is as much a trick or device as it would be falsely to represent in words any material fact whereby the vendor should be induced to part therewith.

But defendant's counsel contends that the alleged representation was not as to any fact present or past, but merely as to what the defendant would do in the future with reference to paying for the goods, and that to say what one intends to do is identical to saying what one will do in the future, which amounts simply to a promise; and, furthermore, that a representation of what will happen in the future, even if not realized, is not such a representation as will support this action. We do not assent to this method of reasoning. The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact; *Clift v. White*, 12 N. Y. 538; hence a witness may be asked with what intent he did a given act. *Seymour v. Wilson*, 14 N. Y. 567. A man who buys and obtains possession of goods on credit, intending not to pay for them, is then and there guilty of fraud. The wrong is fully completed and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover for the wrong and injury sustained. It is true the purchaser may afterwards repent of the wrong and pay for the goods, and the vendor may never know of the wrongful intent. But this does not alter the case at all as to the original wrong and the liability incurred thereby. Of course a mere intention to commit a crime or to do a wrong is no offence. But when the intention is coupled with the doing or accomplishment of the act intended, that moment the wrong is perpetrated and the corresponding liability incurred. See *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573.

In *Stewart v. Emerson*, 52 N. H. 301, where it was alleged, in reply to the defendant's plea of discharge in bankruptcy, that the debt in question was created by the fraud of the defendant, Doe, J., in the course of a long and vigorous opinion, used the following language, which is so apt and pertinent that we quote it. He said: "When the intent not to pay is concealed, the intent to defraud is acted out. The mere omission of A. to disclose his insolvency might not be satisfactory proof of a fraudulent intent in all cases. He might expect to become solvent. He might intend to pay all his creditors. He might intend to pay B. though unable to pay others. His fixed purpose *never* to pay B. is a very different thing from his present inability to pay all or any of his creditors. A man may buy goods, with time for trying to pay for them, on the strength of his known or inferred disposition to pay his debts, his habits, character, business capacity, and financial prospects, without his present solvency being thought of, and even when his present insolvency is known to the vendor. But who could obtain goods on credit, with an unconcealed determination that they should never be paid for? The concealment of such a determination is conduct which reasonably involves a false representation of an existing fact, is not less material than a misrepresentation of ability to pay

(*Bradley v. Obear*, 10 N. H. 477), and is an actual artifice, intended and fitted to deceive.

"An application for or acceptance of credit, by a purchaser, is a representation of the existence of an intent to pay at a future time, and a representation of the non-existence of an intent not to pay. What principle of law requires a false and fraudulent representation to be express, or forbids it to be fairly inferred from the act of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as a means of converting another's goods to his own use without compensation, under the false pretence of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is of course concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud."

Demurrer overruled, and case remitted to the Common Pleas Division for further proceedings.

HICKEY V. MORRELL.

(102 New York, 454.—1886.)

APPEAL from a judgment of the General Term of the New York Common Pleas, affirming a judgment of the Trial Term, in an action to recover for fraudulent representations.

DANFORTH, J. As to the character of this action the parties are agreed. It is for "falsely and fraudulently" and "with intent to deceive and defraud the plaintiff," representing, among other things, that the defendant's warehouse was "fire-proof on the exterior," whereby the plaintiff was induced to deliver to him, to be stored therein, certain property of value, which while there was destroyed by fire communicated from the outside "to the wooden cornice and wooden window frames" of the warehouse and thence to the property in question.

The answer admitted that defendant was proprietor of the warehouse; that it and the article described in the complaint were destroyed by fire, but denied the other matters above referred to as making out a

cause of action, and set up that "the property was received and stored by him as a warehouseman, and in no other capacity, and under the special contract that the goods were stored at the owner's risk of fire." There was no controversy as to the evidence. The question was determined upon that introduced by the plaintiff and in view of the law as it stood at the time of the bailment. The appellant refers to the statute (Laws of 1871, chap. 742, § 8), "in relation to storage and other purposes;" imposing liabilities upon persons for any fire resulting from their willful and culpable negligence, and which, among other things, requires "the closing of iron shutters" at the completion of the business of each day by the occupant of the building having use or control of the same. But the complaint contains no allegation of negligence, and so the action could not stand on that ground either at common law or by statute. Another statute also referred to, relating to buildings in the city of New York, (Laws of 1874, chap. 625, § 5), is of some importance in its bearing upon the point chiefly pressed upon us, and as likely to have been in contemplation of both parties. It is there provided that buildings of a certain description—within which the storehouse in question comes—shall have doors and blinds and shutters made of fire-proof metal on every window and opening above the first story. The plaintiff's testimony went to show that she was induced to store her goods with the defendant by representations contained in a circular issued by him, the object of which, as therein stated, was to call "the special attention of persons having valuable articles, merchandise, or other property for storage, to his new first-class storage warehouse, in the erection of which," it is said, among other things, "no expense has been spared in supplying light, ventilation and protection against the spread of fire, the exterior being fire-proof, and the interior being divided off by heavy brick walls, iron doors, and railings appropriate and convenient in every way for the various kinds of articles to be stored." The learned counsel for the respondent argues that the only statements of fact in the paragraph quoted, are those which relate to the interior as divided by heavy brick walls, iron doors and railings; that as to those, the defendant had knowledge, and concedes that their non-existence would make him guilty of a misrepresentation. This is a very narrow view of the subject, and could prevail, if at all, only by conceding that the defendant purposely avoided mention of those things which, if stated, would make his solicitations less attractive, and display him as the owner of a building combustible on the outside, and so of little security to its contents, if they happened to be of the same character.

We think the appellant's ground of complaint a just one. It was proven that in fact the window frames in the warehouse were of wood; that at the outside of the windows there were no shutters; that the cornices were of wood, covered with tin. The fire occurred in the even-

ing. It originated in other buildings across the street, and from them communicated to the wooden window frames on the defendant's building. An architect and a builder, examined as experts, testified that a building constructed as was the one in question, "with wooden window frames and sashes, and no outside shutters," could not be deemed fire-proof and that in October, 1881, it was practical to erect a storage warehouse which would be fire-proof on the exterior. At the close of the plaintiff's evidence she was nonsuited, upon the ground that the statement in the circular as to the character of the exterior of the building, was a mere expression of an opinion, and not the statement of a fact. Upon the same ground the judgment was affirmed at the General Term. In such a circular, obviously intended as an advertisement, high coloring and exaggeration as to the advantages offered, must be expected and allowed for, but when the author descends to matters of description and affirmation, no misstatement of any material fact can be permitted, except at the risk of making compensation to whoever, in reliance upon it, suffers injury. Here the allegation is that the exterior of the building is fire-proof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible. That statement, as regards certain well-known substances usually employed in the construction of buildings, while it might in some final sense be deemed the expression of an opinion, could in practical affairs be properly regarded only as a representation of a fact. To say of a building that it is fire-proof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. To say of a certain portion of a building it is fire-proof suggests a comparison between that portion and other parts of the building, not so characterized, and warrants the conclusion that it is of a different material. In regard to such a matter of common knowledge, the statement is more than the expression of opinion; no one would have any reason to suspect that any two persons could differ in regard to it. But when we look at the words accompanying this statement, viz.: "No expense has been spared in supplying protection against the spread of fire," all possibility of doubt seems removed. This danger is pointed out as the one thing which, more than another, the owner had in view, and guarded against, and the rest of the sentence shows with what result, viz., "the exterior being fire-proof," and the interior divided off by heavy brick walls, iron doors and railings. Thus the expenditure of money is said to have been limited only by the accomplishment of the desired object, and the statement of the material used is in connection with the representation as to the quality of the exterior. No one on reading of inside walls and railings of incombustible material, and of an exterior fire-proof, could suppose

that a precaution against fire, made necessary by statute, had been omitted, or that a builder who called attention to such matters as an inducement to patronage, could have regarded wooden window frames as in any sense fire-proof. The language of the circular is very emphatic. In effect it says the buildings, as a whole, have been erected at an immense cost, from which assertion alone, in view of the business to which they were devoted, one would expect strength and adaptation of materials and skill in construction, affording security at least against all the ordinary dangers to which property might be exposed when put in store; but this general statement is followed by the declaration that no expense has been spared in supplying "protection against the spread of fire," and this assurance is made prominent by the display of capital letters, and justified by the explanation which relates to an existing state of things, viz., "the exterior being fire-proof," and still further emphasized by the more moderate and qualified statement as to the interior; that is not said to be fire-proof, but only "divided off by heavy brick walls and iron doors and railings," describing at the same time its arrangement and the substance of its walls and partitions. As to this, therefore, the statement would be true, although the floors, lintels, stairs, landings, ties, joists, ceilings and other parts were of wood, but no such discrimination is suggested as to the exterior. The strength of the walls might indeed be impaired by the necessary openings for doors and windows, but for the purpose of preventing mischief by fire, or as the defendant put it, "the spread of fire," the exterior is pronounced fire-proof. Had he only said of the exterior as he did of the interior, "the wall is of brick," the intending customer would have been put to an inquiry as to the window frames and doors. He said much more. We think, therefore, that the defendant must be regarded as stating a fact and not as expressing a mere opinion, when he described the exterior, that is the whole exterior, of his buildings as fire-proof. Such statement is not to be classed with those relating to value, or prospective profits, or prospects of business, or assertions in regard to a speculative matter, concerning any of which men may differ. It relates to something accomplished; to an existing fact, as distinguished from one yet to come into existence; it was made after calling to mind the use to which the buildings were to be put, the fact that the attention of the builder had been especially directed to "protection against the spread of fire," which could be affected only by the use of proper materials; and the statement was made with knowledge that such materials had not been used.

Nor is it like the safe case cited by the respondent. (*Walker v. Milner*, 4 Fost. & F. 745.) There the action was upon a warranty that "the safe in question was thief proof," "that nothing can break into it." It was broken into. There was no suggestion of fraud or deceit, and the jury

were required to discriminate between what was represented and what was warranted, and unless there was a warranty, to find for the defendant. The safe-maker's prospectus was put in evidence; it stated that the safes would insure the safety of valuable property contained in them. The court said: "The words cited from the circular could hardly be understood in the sense of a warranty or assurance of perfect safety, but only as importing a representation of a high degree of strength." They were promissory merely. Then plaintiff's counsel referred to a later prospectus in which the safes in question were only spoken of "as of the strongest security," and relied on this as implying a withdrawal of the previous warranty.

But COCKBURN, J., observed that, "Assuming later prospectuses to have been issued after the burglary, it was only dictated by common honesty. For, after it had been found by actual experience that the safe was not absolutely secure against all possible attempts, it would have been fraudulent to continue previous description."

In the case at bar the plaintiff alleges fraud. A jury might find that an exterior of a city building, partly of wood, although to no greater extent than the one in question, was not fire-proof within the meaning and intent of the circular; they might also find that when the circular was issued, this fact was known to the defendant, and then the doctrine, suggested by COCKBURN, J., in the case cited, would have some application. Nor do the other cases referred to seem to support respondent's contention. They exclude the idea of fraud, and relate to matters of mere opinion. As, whether a certain valve will consume smoke and save fuel? (*Prideaux v. Bunnett*, 1 C. B. [N. S.] 613.) Whether certain pictures were the work of the old masters, or copies? (*Jendwine v. Slade*, 2 Esp. 572.) Whether land was of the value certified to? (*Gordon v. Butler*, 105 U. S. 553.) But in none of them is it denied that if the person making the statement or expressing the opinion had at the time knowledge of its falsity, the action would lie.

It is certainly well settled upon principles of natural justice that for every fraud or deceit which results in consequential damage to a party, he may have an action. Here the complaint states not only a false representation with a fraudulent intent, but that the falsehood was conscious and wilful; that by it the plaintiff was induced to deliver her property to be stored in the building and thereby incurred loss. The evidence may be so viewed as to sustain these allegations.

The learned counsel for the respondent has stated in the broadest and most unqualified terms, as a proposition not to be disputed, "that no man is liable for the expression of his opinion or judgment." But this is true only when the opinion stands by itself and is intended to be taken as distinct from anything else, and where the proposition is found in the books it is so restricted. Thus it is said: "Matters of opinion, stated

merely as such, will not in general form the ground to a legal charge of fraud." (Leake, on Contracts, 355, giving many instances and also exceptions to the rule.) Statements of value have been held insufficient to sustain an action where, as is said, they were "mere matters of opinion," (*Simar v. Canaday*, 53 N. Y. 306); but at the same time it is shown that under certain circumstances they are to be regarded as affirmations of fact, and then if false an action can be maintained upon them. The same rule applies where A. desiring credit of B. for a certain amount, the latter asks C. as to the solvency of A., and he replies, "he is good, as good as any man in the country for that sum." No doubt this involves opinion, but it is held that if the recommendation was made in bad faith and with knowledge that A. was insolvent, C. would be liable. (*Upton v. Vail*, 6 I. R. 181); and so as to every representation concerning a matter of fact by which one man is induced to change his position to his injury or the benefit of another. It may be so expressed as to bind the person making it to its truth whether it take the form of an opinion or not, or it may appear that it was not intended to be acted upon. In the latter case no obligation is incurred.

In the circular issued by the defendant there are many words of commendation, which, however strong, could not be relied upon as the basis of contract. The ones at first referred to are not of that character. They relate to the present and describe a portion of the building in its existing state as "being fire-proof." This is not a matter of opinion, for it defines a state or condition, and if part of that portion was of wood, may properly be regarded as a "false statement of a fact." Whether the defendant knew the component parts of his own buildings, and, if so, whether the statement was made with intent to deceive, and whether it was an inducement to the contract, the learned counsel for the respondent has fully argued. At present it is unnecessary to discuss those questions, for it seems to us they are, as the case stands, properly for the jury, and upon the only point which appears to have been considered by the court below we are obliged to differ from them.

That the issues may be more fully tried, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS and MILLER, JJ., not voting, and EARL, J., dissenting.

Judgment reversed.

SAME: SILENCE AND ARTIFICE.

SMITH v. HUGHES.

(L. R. 6 Queen's Bench, 597.—1871.)

COCKBURN, C. J. This was an action brought in the county court of Surrey, upon a contract for the sale of a quantity of oats by plaintiff to defendant, which contract the defendant had refused to complete, on the ground that the contract had been for the sale and purchase of *old* oats, whereas the oats tendered by the plaintiff had been oats of the last crop, and therefore not in accordance with the contract.

The plaintiff was a farmer, the defendant a trainer of racehorses. And it appeared that the plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and having received answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale, at the price of 35s. per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34s. a quarter.

Thus far the parties were agreed; but there was a conflict of evidence between them as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being *old* oats, the defendant asserting that he had expressly said he was ready to buy old oats, and that the plaintiff had replied that the oats were old oats, while the plaintiff denied that any reference had been made to the oats being old or new.

The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said, "Why, those were new oats you sent me;" to which the plaintiff having answered, "I knew they were; I had none other," the defendant replied, "I thought I was buying old oats: new oats are useless to me; you must take them back." This the plaintiff refused to do, and brought this action.

It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old.

But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was given for the defendant that 34s. a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The learned judge of the county court left two questions to the jury; first, whether the word "old" had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; secondly, whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant.

It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge's direction; whereas now, as it is possible that the verdict of the jury—or at all events of some of them—may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy *old* oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of the opinion that it will not.

The oats offered to the defendant's manager were a specific parcel, of which the sample submitted to him formed a part. He kept the sample for twenty-four hours, and had, therefore, full opportunity of inspecting it and forming his judgment upon it. Acting on his own judgment, he wrote to the plaintiff, offering him a price. Having this opportunity of inspecting and judging of the sample, he is practically in the same position as if he had inspected the oats in bulk. It cannot be said that, if he had gone and personally inspected the oats in bulk, and then, believing—but without anything being said or done by the seller to bring about such a belief—that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller, from the known habits of the buyer, or other circumstances, had reason to infer that the buyer was ascribing to the oats a quality they did not possess, and did not undecieve him.

I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of

inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with that it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honor would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honor would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding.

Mr. Justice STORY, in his work on Contracts (Vol. i. s. 516), states the law as to concealment as follows:—"The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed." "Thus," he goes on to say (s. 517), "although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee." "But," he continues (s. 518), "an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract." Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out (s. 519), that with reference to the latter, the rule is "that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case." In the doctrine thus laid down I entirely agree.

Now, in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats

themselves. What, then, was there to create any trust or confidence between the parties, so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different; or even if he had said anything which showed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts entirely on his own judgment.

The case of *Horsfall v. Thomas*, 1 H. & C. 90, if that case can be considered good law, is an authority in point. In that case a gun which had been manufactured for a purchaser, had, when delivered, a defect in it, which afterwards caused it to burst; yet it was held that, although the manufacturer, instead of making the purchaser acquainted with the defect, had resorted to a contrivance to conceal it, as the buyer had had an opportunity of inspecting the gun, and had accepted it without doing so, and had used it, it was not competent to him to avoid the contract on the ground of fraud. The case has, however, been questioned, and dissenting altogether from the decision, I notice it only to say that my opinion in the present case has been in no degree influenced by its authority.

In the case before us it must be taken that, as the defendant, on a portion of the oats being delivered, was able by inspection to ascertain that they were new oats, his manager might, by due inspection of the sample, have arrived at the same result. The case is, therefore, one of sale and purchase of a specific article after inspection by the buyer. Under these circumstances the rule *caveat emptor* clearly applies; more especially as this cannot be put as a case of latent defect, but simply as one in which the seller did not make known to the buyer a circumstance affecting the quality of the thing sold. The oats in question were in no sense defective, on the contrary they were good oats, and all that can be said is that they had not acquired the quality which greater age would have given them. There is not, so far as I am aware, any authority for the position that a vendor who submits the subject-matter of sale to the inspection of the vendee, is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously have formed of its value. Even the civil law, and the foreign law, founded upon it, which require that the seller shall answer for latent defects, have never gone the length of saying that,

so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value.

It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so that the two minds were not *ad idem*; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give or, from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that, in my opinion, the learned judge of the county court was wrong in leaving the second question to the jury, and that, consequently, the case must go down to a new trial.

*Judgment accordingly.*¹

STEWART V. WYOMING RANCHE CO.

(128 United States, 383.—1888.)

GRAY, J. The original action was brought by the Wyoming Cattle Rancho Company, a British corporation, having its place of business at Edinburgh in Scotland, against John T. Stewart, a citizen of Iowa. The petition contained two counts.

The first count alleged that in July, 1882, the defendant, owning a herd of cattle in Wyoming Territory, and horses going with that herd, and all branded with the same brand, and also 80 short-horn bulls, and 700 head of mixed yearlings, offered to sell the same with other personal property for the sum of \$400,000; and at the same time represented to

¹ Opinions by Blackburn and Hannen, JJ., omitted.

the plaintiff and its agent, that there had already been branded 2800 calves as the increase of the herd for the current season, and that the whole branding of calves and increase of the herd for that season would amount to 4,000, and that, exclusive of the branding for that year, the herd consisted of 15,000 head of cattle, and that there were 150 horses running with it and branded with the same brand; that had the representation that 2,800 calves had been branded been true, it was reasonable from that fact to estimate that the whole branding for that year would be 4,000 head, and that the whole herd exclusive of the increase for that year was 15,000 head; that the defendant, when he made these representations, knew that they were false and fraudulent, and made them for the purpose of deceiving the plaintiff and its agent, and of inducing the plaintiff to purchase the herd; and that the plaintiff, relying upon the representations, and believing them to be true, purchased the herd and paid the price.

The second count alleged that the defendant had failed to deliver the bulls and yearlings as agreed.

At the trial the following facts were proved: The defendant, being the owner of a ranche with such a herd of cattle, gave in writing to one Tait the option to purchase it and them at \$400,000, and wrote a letter to Tait describing all the property, and gave him a power of attorney to sell it. He also wrote a letter describing the property to one Majors, a partner of Tait. A provisional agreement for the sale of the property, referring to a prospectus signed at the same time, was made by Tait with the plaintiff in Scotland, a condition of which was that a person to be appointed by the plaintiff should make a favorable report. One Clay was accordingly appointed, and went out to Wyoming and visited the ranche; certain books and schedules made by one Street, the superintendent of the ranche, were laid before him; and he and the defendant rode over the ranche together for several days.

Clay testified that, in the course of his interviews with the defendant, the latter made to him the false representations alleged in the petition, and requested him to rely on these representations, and not to make inquiries from the foreman and other persons; and, that relying on the representations, he made a favorable report to the plaintiff, which thereupon completed the purchase. The plaintiff also introduced evidence tending to prove the other allegations in the petition. The defendant testified that he never made the representations alleged.

The jury returned a general verdict for the plaintiff in the sum of \$55,000, upon which judgment was rendered, and the defendant sued out this writ of error.

No exception was taken to the judge's instructions to the jury upon the second count. The only exceptions contained in the bill of exceptions allowed by the judge, and relied on at the argument, were to the

following instructions given to the jury in answer to the plaintiff's requests:

"14. I am asked by the plaintiff to give a number of instructions, a portion of which I give, and a portion of which I must necessarily decline to give. My attention is called to one matter, however, and as I cannot give the instruction as it is asked for, and as the matter it contains is, as I think, of the first importance, I will state my own views upon that particular point.

"I am asked to say to the jury, if they believe from the evidence that, while Clay was making the inspection, Stewart objected to Clay making inquiries about the number of calves branded, of the foreman and other men, and thereby prevented Clay from prosecuting inquiries which might have led to information that less than 2,000 calves had been branded, the jury are instructed that such acts on the part of Stewart amount in law to misrepresentations.

"In reference to that point, I feel it my duty to say this to the jury, that if the testimony satisfies you that after all the documents in question that have been introduced in evidence here went into the hands of the home company in Scotland, where it had its office and where it usually transacted its business, if it was not satisfied with what appears in those papers, and if it did not see proper to base its judgment and action on the information that those papers contained, but nevertheless sent Clay to Wyoming to investigate the facts and circumstances connected with the transaction, to ascertain the number of cattle and the number of horses and the condition of the ranche, and the number of calves that would probably be branded; if the company sent him there as an expert for the purpose of determining all those things for itself and for himself, and relied upon him, and he was to go upon the ranche himself, and exercise his own judgment, and ascertain from that, without reference to any conversation had with Stewart, then it would make no difference. But whilst he was in pursuit of the information for which he went there, Stewart would have no right to throw unreasonable obstacles in his way to prevent his procuring the information that he sought and that he desired. If the testimony satisfies you that when they did go there together, and whilst Clay was making efforts to procure the information which he did, and whilst he was in pursuit of it, and while he was on the right track, Stewart would have no right to throw him off the scent, so to speak, and prevent him, in any fraudulent and improper way, from procuring the information desired, and, if he did that, that itself is making, or equal to making, false and fraudulent representations for the purpose in question. But if Stewart did none of these things, then, of course, what is now said has no application.

"15. In determining whether Stewart made misrepresentations about the number of cattle, or the loss upon his herd, or the calf brand of 1882,

the jury will take into consideration the documents made by Stewart prior to and upon the sale namely, the power of attorney to Tait, the descriptive letter, the optional contract, letter to Majors, schedules made by Street, provisional agreement and prospectus, and his statements to Clay, if the jury finds he made any, upon Clay's inspection trip; and if the jury find that in any of these statements there were any material misrepresentations on which plaintiff relied, believing the same, which have resulted to the damage of the plaintiff, the plaintiff is entitled to recover for such damage.

"16. If the jury find from the evidence that Stewart purposely kept silent when he ought to have spoken and informed Clay of material facts, or find that by any language or acts he intentionally misled Clay about the number of cattle in the herd, or the number of calves branded in the spring of 1882, or by any acts of expression or by silence consciously misled or deceived Clay, or permitted him to be misled or deceived, then the jury will be justified in finding that Stewart made material misrepresentations; and must find for the plaintiff, if the plaintiff believed and relied upon the representations made by the defendant."

The judge, at the beginning and end of his charge, stated to the jury the substance of the allegations in the petition as the only grounds for a recovery in this action; and, at the defendant's request, fully instructed them upon the general rules of law applicable to actions of this description, and gave, among others, the following instructions:

"5. In order to recover on the ground of false representations, such false representations must be shown to be of a then existing matter of fact material to the transaction; and no expression of opinion or judgment or estimation, not involving the assertion of an unconditional fact, can constitute actionable false representation, and in such case the jury must find for the defendant on the first count in the petition."

"8. In order to justify a recovery, it must be shown by proof that the plaintiff's agent relied upon the alleged false representations, and made them the ground and basis of his report, but that he was so circumstanced as to justify him in so relying upon and placing confidence in said representations; and if it appears that he had other knowledge, or had received other representations and statements, conflicting therewith, sufficient to raise reasonable doubts as to the correctness of such representations, then there can be no recovery on the first count."

The judge, of his own motion, further instructed the jury that they were to decide upon the comparative weight of the conflicting testimony of Clay and of the defendant, and added, "It seems to me that the first count must hinge upon that one point, because, if there was no statement made by Stewart to Clay with reference to the number of calves that were branded, during this trip of inspection of the ranche,

then it seems to me that the whole theory which underlies the claim of the plaintiff must be an erroneous one."

Taking all the instructions together, we are of opinion that they conform to the well-settled law, and that there is no ground for supposing that the jury can have been misled by any of the instructions excepted to.

In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare*; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.

The case of *Laidlaw v. Organ*, 2 Wheat. 178, is much in point. In an action by the buyer of tobacco against the sellers to recover possession of it, there was evidence that before the sale the buyer, upon being asked by Girault, one of the sellers, whether there was any news which was calculated to enhance its price or value, was silent, although he had received news, which the seller had not, of the Treaty of Ghent. The court below, "there being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to the said news, and to induce him to think or believe that it did not exist," directed a verdict for the plaintiff. Upon a bill of exceptions to that direction, this court, in an opinion delivered by Chief Justice MARSHALL, held that while it could not be laid down, as a matter of law, that the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor, yet, at the same time, each party must take care not to say or do anything tending to impose upon the other, and that the absolute instruction of the judge was erroneous, and the question whether any imposition was practiced by the vendee upon the vendor ought to have been submitted to the jury.

The instructions excepted to in the case at bar clearly affirmed the same rule. The words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself,

of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranche with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranche.

In giving the fourteenth instruction, the judge expressly declined to say, that if the defendant prevented the plaintiff's agent from prosecuting inquiries which might have led to information that less than 2,000 calves had been branded, such acts of the defendant would amount in law to misrepresentations; but on the contrary submitted to the jury the question whether the defendant fraudulently and improperly prevented the plaintiff's agent from procuring the information demanded; and only instructed them that if he did, that was making, or equal to making, false and fraudulent representations for the purpose in question.

So the clear meaning of the sixteenth instruction is, that the jury were not authorized to find material misrepresentations by the defendant, unless he purposely kept silent as to material facts which it was his duty to disclose, or by language or acts purposely misled the plaintiff's agent about the number of cattle in the herd or the number of calves branded, or, by words or silence, knowingly misled or deceived him, or knowingly permitted him to be misled or deceived, in regard to such material facts, and in one of these ways purposely produced a false impression upon his mind.

The defendant objects to the fifteenth instruction, that the judge submitted to the jury the question whether the defendant made misrepresentations about the number of cattle, and about the loss upon the herd, as well as about the calf brand of 1882. It is true that the principal matter upon which the testimony was conflicting was whether the defendant did make the representation that 2,800 calves had been branded in that year. But the chief importance of that misrepresentation, if made, was that it went to show that the herd of cattle which produced the calves was less numerous than the defendant had represented; and the petition alleged that the defendant made false and fraudulent representations, both as to the number of calves branded and as to the number of the whole herd. So evidence of the loss of cattle by death, beyond what had been represented by the defendant, tended to show that the herd was less in number than he represented.

The remaining objection argued is to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict. It is a conclusive answer to this objection, that no exception was taken to this instruction at the time it was given, or before the verdict was returned.

The fact that neither of the counsel was then present affords no excuse. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record.

Judgment affirmed.

KUELLING V. LEAN MANUFACTURING CO.

(183 New York, 78.—1905.)

“THE plaintiff is a farmer, residing in East Penfield, Monroe County, in this state; the defendant is a foreign corporation organized under the laws of the state of Ohio, and engaged in the manufacture and sale of farming implements, its manufactory being located at Mansfield, in that state.

“A few weeks prior to April, 1902, the defendant sold to the firm of Weaver, Palmer & Richmond, who were engaged in the business of selling agricultural implements in the city of Rochester a certain road roller, with a tongue to which was attached a team of horses when in use. A few days after this sale the purchasers sold the roller to the firm of Fuller & Barnhart, dealers in agricultural implements at Fairport, Monroe County, in this state. In April, 1902, the plaintiff purchased the road roller of the firm of Fuller & Barnhart, used it a short time in the spring on his farm, stored it in a covered shed until about the first day of the following September, when he had occasion to use it again in the conduct of his ordinary farm work, and while so engaged with two horses attached thereto, the tongue broke, precipitating him from a seat which was attached to the rear end of the tongue immediately over the roller, causing the horses to run away. Plaintiff clung to the reins for a short distance, was compelled to release his hold and the roller, weighing some seven hundred pounds, passed over him, inflicting severe injuries.

“This action was brought by the plaintiff against the defendant as the manufacturer of this roller, and is based upon the allegation that in constructing it the defendant ‘intentionally, willfully, maliciously, negligently and fraudulently’ put into it a tongue made of cross-grained black or red oak which was unfit for that purpose; that the tongue

had a knot in it, and in addition a large knothole just in front of the point at which the evenér and whiffletrees were attached; that the defendant concealed this knothole with a plug of soft wood nailed in, and then the knot, the plug, the hole, the cross-grain of the wood and the kind of wood used were covered up and concealed by the defendant with putty and paint so that the defects could not be seen by inspection; that the tongue was placed in the roller so that the knot and plug were on the underside; that the roller by reason of these defects was dangerous to the life and limbs of any person who should use it, and that the defects aforesaid made the tongue so weak that it broke as before stated at the time of plaintiff's injury and was the cause thereof." ¹

The plaintiff, being nonsuited, excepted and moved for a new trial.

VANN, J. One who carelessly labels a deadly poison as a harmless medicine and puts it on the market in that condition is liable to any person who without notice of its dangerous character uses the same to his injury. *Thomas v. Winchester*, 6 N. Y. 397. The manufacturer of a machine not inherently dangerous to human life, but with a defect therein which he pointed out to one who purchased it for his own use and at his request attempted to remedy the defect and then painted it over, is not liable to one who was injured while using the same with the consent of the purchaser. *Loop v. Litchfield*, 42 N. Y. 351.

The first case is typical of those which permit the user of a machine, appliance or article that is inherently dangerous to recover damages from the maker for injuries sustained without notice, and the second of those which deny relief when the machine is not inherently dangerous to human life.

We now have a case before us with a new element, that of deceit on the part of the manufacturer, who intentionally so concealed a defect in a machine not intrinsically dangerous as to thereby make it dangerous and without notice sold it to one, who, as he knew, intended to sell it to any purchaser he could find. The deceit, as the jury might have found, consisted in the complete concealment of a defect, not necessarily dangerous if unconcealed but dangerous when concealed, and putting the implement in this condition on the market, without notice to any one, with the intention that it should be sold and used as a safe implement. The natural result of this conduct was to injure whomsoever might use the implement, whether he was the original purchaser, or any subsequent purchaser, or one who simply used it with the consent of the owner.

A manufacturer has the right to sell a defective machine, if he gives notice of the defect to the purchaser, who in turn has the same right.

¹ From opinion by Bartlett, J.

Neither has the right, however, with furtive intent, to completely conceal the defect and sell the machine as sound and safe, intending it to be used as such by any one into whose possession it might lawfully come, when the natural result would be the infliction of an injury upon any person who used it. By giving currency to the implement as safe, with the intent to deceive not only the purchaser but any user, and yet so covering up the defect as to entirely conceal it, the defendant was guilty of an actionable wrong, as the jury might have found. While the machine was not inherently dangerous, that fact is not controlling, for the danger was in the concealed defect in an implement sold as sound, and which not only appeared to be sound, but the maker caused it to so appear with intent to deceive. It would be illogical to hold the maker of a poisonous medicine, who negligently but unintentionally labeled it as an innocent remedy and sold it, liable to any one who used it without notice of its character, but not to hold him liable if he intentionally created a danger in a machine apparently safe, which might be as fatal as poison, and, after concealing it in such a way as to prevent detection, put it on the market. While the danger in the one case is not so great as in the other, still if the natural result would cause bodily harm to a human being, that regard for the safety of life and limb which the common law is so careful to shield, should hold the wrongdoer liable in both. A land roller is an implement not ordinarily dangerous, but one with a defective tongue, when the defect is thoroughly concealed for the purpose of making a better sale, may turn out to be as dangerous as a cartridge loaded with dynamite instead of gunpowder. Liability in this case rests on the simple extension of the well-established principle that the maker of an article inherently dangerous but apparently safe, who puts it on the market without notice, is liable to one injured while using it, to the maker of an article, not inherently dangerous, who made it dangerous by his own act but so concealed the danger that it could not be discovered and put it on the market to be sold and used as safe. The extension is logical and consistent with the authorities, for if the implement is not inherently dangerous, but the use thereof is made dangerous by a defect wrongfully concealed, the result is the same and the motive worse. I concur for reversal.

CULLEN, Ch. J., HAIGHT and WERNER, JJ., concur, and GRAY, J., concurs with BARTLETT, J., only; O'BRIEN, J., absent.

*Judgment reversed, etc.*¹

¹ Opinion by Bartlett, J., omitted.

ROTHMILLER V. STEIN.

(143 New York, 581.—1894.)

APPEAL by the defendants from a judgment of the general term of the Common Pleas of the city and county of New York, which affirmed a judgment for the plaintiff.

PECKHAM, J. The defendants insist that there is no legal fraud alleged in the complaint, and that, even if there be such allegation, the complaint does not contain any statement showing that legal damage can flow from the fraud. We think the complaint is good in both particulars. The first ground upon which the defendants allege the action is not maintainable is founded upon the statement that the plaintiff was not induced to take affirmative action by defendants' false representations, but that he simply remained passive, did nothing, and refrained from selling his stock at a price which would have been more advantageous to him than that at which he in fact sold. The plaintiff did not remain passive. He had received two different offers from one who was also a stockholder, and who offered to purchase from him his stock. The one offer was \$80 cash per share; the other was \$50 cash, with the right to another \$50 per share in January, 1894, in case the company should in the meanwhile have paid dividends for 1893 equal to 10 per cent. The plaintiff asked these defendants for facts in relation to the condition of the company upon which he might make up his mind which offer to accept, and they were informed of the character of the two offers, and of the reasons for his inquiries. The defendants, being directors, and knowing the facts, and for the purpose of deceiving the plaintiff, made statements in regard to the condition of the company which they knew to be false, and they did it for the purpose of making him believe, for reasons of their own, that the business of the company was flourishing, and they advised him not to sell his stock at less than par. The plaintiff relied upon these false statements of the defendants thus made to him, which they knew were false, and which they made with a fraudulent purpose, and he, because of the false representations, accepted the offer for the purchase of his stock at the above-mentioned \$50 cash rate per share, with the conditional promise of \$50 more, instead of taking the \$80 cash. Instead, therefore, of remaining passive, the plaintiff took affirmative action, induced thereto by the fraudulent statements of the defendants. We do not, however, mean to imply the correctness of the doctrine advanced by the counsel for the defendants, that if a person simply refrain from acting, induced thereto by the fraud of another, he can in no case recover damages sus-

tained by him on account of such fraud. Such a case is not here now. Here the plaintiff alleges he has sustained damages because the company was in such a condition pecuniarily at the time of his sale of the stock that it would have been better for him in the money result if he had accepted the \$80 cash instead of the \$50 conditional offer of purchase which was made to him, and that he would have sold at the former price if the defendants had told him the truth. He had two courses open in selling his stock, and the defendants knew it, and he was induced to take the one from which he has suffered loss because of the fraudulent representations of defendants. It is not alone a failure to sell, but there is also an actual sale, produced by the fraud of the defendants. The damage arises from the sale at one price, coupled with the fact that plaintiff would have sold at the other price but for the fraudulent representations of the defendants. The fact that their chief purpose was to induce, by means of these false representations, a belief on the part of the plaintiff that the company was prosperous, and that their representations were not specially and solely made to induce the plaintiff to sell his stock at one figure rather than another, is, in the light of all the facts, not material. The defendants knew the reason for and the purpose of the plaintiff's inquiries, and they knew that the direct, proximate, and natural result of their fraudulent representations would in that particular case be the sale of the plaintiff's stock by him at the conditional sale at par, rather than the absolute cash one. They must, therefore, be held to have intended what was the natural and direct result of their misrepresentations, although such misrepresentations were not specially induced by a design to bring about such sale. They cannot, in such case, shelter themselves under the statement that they did not make the representations—*i. e.*, commit the fraud—with the motive or for the purpose of inducing the plaintiff to sell his stock. They intended to deceive the plaintiff, and they were induced thereto by other causes; yet the natural, proximate, and direct result of such deception they knew or had reasonable ground for believing would be this sale, although its accomplishment was not the particular purpose of their fraud. In such case their liability would seem to be plain.

There is nothing in the case of *Brackett v. Griswold*, 112 N. Y. 454, which runs counter to this doctrine. In that case it was asserted—what there can be no doubt about—that to sustain a recovery in an action for fraud and deceit the fraud and injury must be connected. The one must bear to the other the relation of cause and effect, and it must be seen in an appreciable sense that the damage flows from the fraud as the proximate, and not as the remote, cause. The complaint in this case, we hold, shows such to be the case. From the allegations in the complaint, if properly denied, it might be a question for the jury to decide whether the plaintiff, if the truth had been told him, would or

would not have sold his stock at the rate of \$80 cash. The demurrer admits that he would. Having two offers for the purchase of his stock, the inference might be drawn from all the facts stated that, if the truth had been told by defendants, the plaintiff would have sold at the \$80 cash price. The inference arising from all the facts alleged that he would have done so if the truth had been told, is neither too remote, indefinite, or contingent to form part of the basis of a cause of action. The case differs widely, in these respects, from *Bradley v. Fuller*, 118 Mass. 239, and cases therein cited. What a person would have done, but did not do because (as he alleges) of the fraud of another, may not always be a matter of such vague conjecture as to render the question incapable of that degree of proof upon which courts of justice may properly act. Cases may readily suggest themselves where such possible action would be too problematical and vague to base any verdict upon it. Some of the cases cited in the Massachusetts case, *supra*, would seem to be of that nature. In the case under consideration we think the complaint presents facts from which a jury ought to be permitted to decide the issue whether or not, but for the fraud, the plaintiff would have sold at the cash price. We are therefore of the opinion that the complaint contains allegations sufficient to show the commission of actionable fraud.

The other ground taken by defendants is based upon the fact that the complaint alleges that the corporation at the time of the sale of the stock by plaintiff was insolvent, and the defendants claim that if they had told the plaintiff the truth he would have known that fact, and would have been himself guilty of fraud if he did not communicate it to the intending purchaser, and if such purchaser were informed of the financial condition of the corporation it must follow as a legal conclusion that he would not have purchased the stock at all, or at least at any such price as was actually received by plaintiff; and hence the latter has sustained no damage by the misrepresentations of the defendants. In the first place, we are scarcely prepared to say as matter of law that no one would purchase stock in what he knew was an insolvent corporation at the price of \$80 a share. That might depend upon a great variety of facts, such as the cause and extent of the insolvency, and whether, in the opinion of the intending purchaser, the result were remediable or final, his familiarity with that cause, and his belief in his or his friends' ability to remedy it, his opinion of the value of the stock if the business were properly conducted, his belief in his own or his friends' ability to properly conduct it at remunerative and profitable rates, and the prospect of obtaining sufficient control over the corporate action by the purchase of stock to enable the purchaser to carry out his policy and control the management of the company. Other facts may be easily imagined which would naturally have great weight

with an intending purchaser even assuming the insolvency. The complaint in this case shows that the insolvency arose from the failure of the defendants to pay in the amount of the capital which they certified they had, viz., \$5,000 each out of a total of \$20,000 alleged to have been paid in, coupled with the fact that the defendants had grossly mismanaged the affairs of the company, and had squandered its moneys in the payment of large salaries, and had thereby crippled its business. It does not appear that the defendants are unable to respond to a demand that they pay in the amount of capital due from them, nor does it appear that if it were paid, and the salaries cut down, and the management changed, the company would not be able to go on, and make a profit on its business. It cannot be said as matter of law that if the plaintiff had communicated to the intending purchaser the facts as to the condition of the company, no such sale as the plaintiff describes would have taken place, and the plaintiff, therefore, would not have been damaged. But, even if the defendants had informed the plaintiff that the company was insolvent when he made his inquiries of them, was he under a legal obligation to volunteer that information to the intending purchaser before the sale was made? We think not. We do not and we cannot in courts of law practically and wisely deal with mere moral obligations, such obligations as only a man of very high honor would feel himself bound by, or such duties as alone grow out of the moral obligation of doing as you would be done by. These are matters for the conscience, and they are duties which, in the extent of their obligation, open up the vast domain of ethics, into a discussion of which it is not practically possible for human courts to enter, or to pronounce judgment concerning a violation of its doctrines. There are, of course, occasions upon which it becomes the legal duty of the individual to volunteer information unasked by another, occasions where a failure to state a fact is equivalent to a fraudulent concealment, and avoids a contract equally with an affirmative falsehood.

The inquiry, then, is whether, upon any particular occasion, it was the duty of the person to speak on pain of being guilty of a fraud by reason of his silence. Certain rules have been laid down by the courts, which differ somewhat in their breadth and scope with the different and varying circumstances under which they are to be applied. The contract of marine or life insurance has been held to require the exhibition of the very highest good faith on the part of the person desiring insurance, and he has been held liable for the concealment of any material fact known by him to exist, although such concealment was not fraudulent. On the other hand, in the case of the contract of guaranty, it has been held that the concealment of a fact, in order to vitiate the contract, must be fraudulent, —i. e., concealed with a fraudulent purpose, with the intent to deceive. *Insurance Co. v. Lloyd*, 10 Exch. 523; *Kidney v. Stoddard*, 7

Metc. (Mass.) 252. In regard to sales of goods, the common law has adopted a rule which is not so strict as in the above classes of contracts. The great maxim, "*Caveat emptor*," is by this law applied in a variety of cases, and, unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding the existence of intrinsic defects and vices known to the vendor and unknown to the vendee materially affecting its value. 1 Story, Eq. Jur. (10th Ed.) §§ 212, 212a. This is the rule in regard to those who deal at arm's length with each other, and between whom there is no condition of special confidence or fiduciary relationship existing. In regard to the necessity of giving information which has not been asked, the rule differs somewhat at law and in equity; and while the law courts would permit no recovery of damages against a vendor because of mere concealment of facts under certain circumstances, yet if the vendee refused to complete the contract because of the concealment of a material fact on the part of the other, equity would refuse to compel him so to do, because equity only compels the specific performance of a contract which is fair and open, and in regard to which all material matters known to each have been communicated to the other. Id. § 206. And the rule of *caveat emptor*, even in regard to the sale of chattels, is applied with certain restrictions, and is not permitted to obtain in a case where it is plain it was the duty of the vendor to acquaint the vendee with a material fact known to the former and unknown to the latter. It has been held that it is the duty of one who is about to sell a flock of sheep to inform the intending purchaser, of the fact, if it be known to the vendor, of the existence of a highly contagious disease among the sheep to be sold, and that it is a fraudulent suppression of a material fact if it be knowingly concealed. So, in regard to the sale of food for animal or human consumption, the law annexes an implied warranty that the food is not in an unwholesome condition, and unfit to be eaten. *Jeffrey v. Bigelow*, 13 Wend. 518; *Van Bracklin v. Fonda*, 12 Johns. 468. In such cases the rule of *caveat emptor* cannot be applied. Again, it is not applied in its full extent to the case of sales of choses in action, such as bonds and promissory notes and other obligations for the payment of money. Thus in *Brown v. Montgomery*, 20 N. Y. 287, it was held to have been a fraudulent suppression, avoiding the sale of a promissory note, where the vendor did not inform the vendee that the check of the maker of the note had been protested, though the informant of the vendor stated at the time his opinion that the maker of the note was solvent. And this decision rests upon the principle that one who sells commercial paper payable to bearer, and which he does not indorse, while not liable on the paper as a party, nevertheless warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the insolvency of

the makers, or because it has been already paid. A promissory note, or the ordinary bond, is given for one purpose only,—payment at its maturity; and it is plain that in ordinary circumstances one would not take a note or bond if in possession of the fact of the insolvency of its maker. It would appear that the one purpose for which such instruments are issued would fail of accomplishment because of the inability of the maker to pay. The mere fact that the vendor offers to sell the written obligation of another to pay money is evidence enough of a warranty such as is above stated, because the vendor knows that if the maker were known to be insolvent his written obligation to pay money would not be taken.

Of the same nature is the decision in the case of *Bruce v. Ruler*, 2 Man. & R. 3, 17 E. C. L. 700, where it was held that it was the duty of the tenant, who proposed to his landlord a surrender of his lease to another to be taken in his stead, to inform the landlord of the fact, which the tenant knew, that the proposed tenant (who proved to be insolvent) had compounded with his creditors; and that the failure of the tenant to state such fact was a fraud which rendered him still liable for the rent. One of the most material and important facts relating to a tenant is that he shall be of sufficient ability to pay rent, or, in other words, shall not be insolvent; and Mr. Justice BAYLEY on the trial said it was to be presumed that if the landlord had known the fact he would not have accepted the man as tenant, and the suppression of the fact by the existing tenant was, legally speaking a fraud; that it was very desirable, if possible, to make people honest. The same reason exists as in the above case of the sale of a written obligation to pay money, where the vendor does not indorse or become a party to the obligation, and the fact of insolvency is of such paramount importance that a presumption exists that the proposed tenant would not have been taken if the fact were known. Solvency is among the almost absolutely necessary conditions. Insolvency, however, is not always regarded as of so fundamental a character that its mere concealment in any transaction is in and of itself a fraud. Thus in *Nichols v. Pinner*, 18 N. Y. 95, it was held that a merchant who knew that he was insolvent, and nevertheless purchased goods without disclosing that fact, there being no inquiry by the vendor, was not necessarily guilty of fraud on account of such concealment, because he might have been honestly of the opinion that he could yet go on and retrieve his affairs. That case was again before this court under the name of *Nichols v. Michael*, 23 N. Y. 64, but the above doctrine was not altered or shaken. This court therefore recognizes that there is a great difference between the insolvency of one who is about to purchase goods and that of the maker of an obligation to pay money, which a third party desires and offers to sell; and it is seen that in the one case the failure to inform the other of the fact of such insolv-

ency is not necessarily a fraud, and in the other its willful suppression is.

We think the present case comes more within the principle of the merchant buying goods than of the seller of commercial paper, the maker of which he knows or has good reason to believe to be insolvent. In the case as made by this complaint the vendee of the stock was already the owner of some of the stock in the same company, and plaintiff was neither a director nor other officer of the company, and had no special means of acquiring information superior in the last degree to those of the vendee. The parties occupied no position of trust or confidence towards each other, and there was nothing in their relations each to the other that had in them the least element of a fiduciary nature. Each was in fact dealing, as it is called, at arm's length with the other; and we cannot say in such case that it would have been the legal duty of the vendor to volunteer the information that the company was insolvent. The defendant was held liable in *Lefevre v. Lefevre*, 30 N. Y. 27, because he had been guilty of false representations, and his position as cashier put him in full knowledge of the condition of the bank, which the other did not in fact know. In regard to a business corporation which is engaged in the transaction of business as a going concern, the mere fact that it is at the moment insolvent is not of that kind of materiality which breaks in upon and avoids the general rule in this state of *caveat emptor*. The purchase of stock in such a corporation is made under so many different circumstances, and urged by so many different motives, wholly apart from the present alleged or assumed insolvency of the corporation, that we cannot, and, as we think, ought not, to place the sale of such stock in the same class and subject to the same rules as the sale of commercial paper under the facts as stated in the *Brown Case*, *supra*.

I have already alluded to some of the circumstances which might naturally induce the purchase of stock in a corporation temporarily insolvent, and it is not necessary to repeat them here. Under the rule in this state the fact suppressed may in many cases be material, and yet its suppression may not be fraudulent. If there be a legal obligation to speak, such as in a case of trust or confidence or superior knowledge or means of knowledge, the case is altogether different. There is in this case the further fact that the vendee of this stock was the one who proposed the bargain and made the offer; that he was a stockholder, and presumably, before he made the offer, had satisfied himself, so far as he desired, as to the condition of the company, and had decided what he could, for his own purposes, properly pay for the stock. It thus appears that the plaintiff was not searching for a purchaser and making offers to sell, but that the purchaser was seeking him, and initiating the transaction by an offer to purchase. The vendor might, under such circum-

stances at all events, conclude that the proposed purchaser had all the knowledge he desired in order to enable him to make his offer, and the vendor might decide to accept one of the two offers proposed to him without making any statement as to the company not called for by the purchaser. We cannot say that in the case under consideration there was a legal obligation to speak. But at the same time the least degree of misrepresentation would be very potent evidence of fraud. We think the demurrer of the defendants is not good, and the judgment overruling it must be affirmed, with costs, with leave to defendants to plead over on payment of costs. All concur.

Judgment accordingly.

SCIENTER.

DERRY V. PEEK.

(L. R. 14 Appeal Cases, 337.—1889.)

By a special Act (45 & 46 Vict. c. 159) the Plymouth, Davenport & District Tramways Co. was authorized to make certain tramways. By § 35, the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By § 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78), which section was incorporated in the special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

In February, 1883, the appellants as directors of the company issued a prospectus containing the following paragraph: "One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament, obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Relying, as alleged, upon such representations, the plaintiff became a share holder; the company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power, except on certain portions of the tramways. As a result the company was wound up, and, in 1885, the respondent brought this action of deceit.

At the trial, before STIRLING, J., the action was dismissed; that de-

cision was reversed by the Court of Appeal (37 Ch. D. 541); and from that decision the defendants appealed.

LORD HERSCHELL:—

My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus, issued by them, certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

“This action is one which is commonly called an action of deceit, a mere common law action.” This is the description of it given by COTTON, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extends beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes v. Lock*, 10 Ves. 470, may be cited as an example where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was

true affords no defence to the action. Lord Selborne pointed out in *Brownlie v. Campbell*, 5 App. Cas. p. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of COTTON, L. J., in *Arkwright v. Newbould*, 17 Ch. D. 320. It was adopted by Lord Blackburn in *Smith v. Chadwick*, 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below COTTON, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed, or any one of the class to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement, careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action.

That the learned Lord Justice thought that if a false statement were made without reasonable ground for believing it to be true an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present,

to be circulated amongst persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others."

The learned judge proceeds to say: "Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty, that is to say, an untrue statement made without any reasonable ground for believing that statement to be true; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statements have to have true statements only made to them."

Now I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statements of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe that the Lord Justice distinctly says that if there be such a departure from duty an action of deceit can be maintained, though there be not what he should call fraud. I shall have by-and-by to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud", or "fraud in law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavor to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal. . . .

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations, made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence to such reasonable ground as evidence merely that the statements were

made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, LOPES, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

* * * * *

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L., Sc. 145, 162, the Lord President told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit." Exception having been taken to this direction without avail in the Court of Session, Lord CHELMSFORD in this House said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a *bona fide* belief in its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit."

I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same

way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley v. Freeman*, 2 Smith's L. C. 74, down to that with which I am now dealing. Even when the expression "fraud in law" has been employed there has always been present, and regarded as an essential element, that the deception was willful, either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord CRANWORTH. In delivering his opinion in the same case he said: "I confess that my opinion was, that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bona fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

* * * * *

Having now drawn attention, I believe, to all the cases having a material bearing upon the question, under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has

obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley v. Freeman*, 2 Smith's L. C. 74, down to *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L., Sc. 145, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord CRANWORTH, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord CHELMSFORD's view until the case of *Weir v. Bell*, 3 Ex. D. 238, where it seems to be involved in Lord Justice COTTON's enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as established law. The *dictum* of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed COTTON, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor v. Ashton*, 11 M. & W. 401, appears to me to be in direct conflict with the *dictum* of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume, to the *dicta* of COTTON, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor v. Ashton*, 11 M. & W. 401, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds

for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord BLACKBURN in *Brownlie v. Campbell*, 5 App. Cas. at p. 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

* * * * *

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. D. at p. 67, I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and *bona fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

*Order of the Court of Appeal reversed; order of Stirling, J., restored; the respondent to pay to the appellants their costs below and in this House; cause remitted to the Chancery Division.*¹

¹ Opinions by Lords Watson, Bramwell and FitzGerald omitted.

WATSON V. JONES.

(41 Florida, 241.—1899.)

CARTER, J. * * * The very name of the action, "deceit," implies that it is and must be founded on fraud. For this reason the action for deceit is not an appropriate remedy to relieve against negligence, accident or mistake, or in which to recover for breach of contract, or upon a warranty, though it seems that an action on the case for breach of an express warranty or for false warranty will lie, in which neither allegation nor proof of *scienter* is required. *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. Rep. 1283. It is not pretended that this action can be considered as one for damages for a false warranty or for breach of an express warranty. The action being for deceit is necessarily founded in fraud, and in order to make out a case of fraud, as distinguished from inadvertence, mistake, negligence, accident and the like, it is necessary to allege and prove the *scienter*—the knowledge of defendant that his representations were false. *Binnard v. Spring*, 42 Barb. 470; *Holmes v. Clark*, 10 Iowa, 423. This is generally held to be the rule both in England and America, and the distinction between fraud and warranty, between deceit and honest mistake, should not be lost sight of, nor should the action for deceit be confounded with other actions at law or in equity in which no proof of *scienter* is required. The courts are not entirely harmonious as to the quantity and character of proof necessary to sustain the allegation of *scienter* in cases of this character. The English doctrine, as announced in the comparatively recent case of *Derry v. Peek*, L. R., 14 App. Cas. 337, which reviews many previous decisions, is that in order to maintain an action for deceit there must be proof of fraud; that fraud may be proved by showing that a false representation has been made, first, knowingly, second, without belief in its truth, third, recklessly careless whether it be true or false; or in other words, in order to prevent a false statement being fraudulent there must be an honest belief in its truth. In Alabama, Colorado, Nebraska and some other States the courts do not seem to require proof of *scienter* in cases where the party making a false representation professes to speak from his own knowledge. *Munroe v. Pritchett*, 16 Ala. 785; *Jordan v. Pickett*, 78 Ala. 331; *Goodale v. Mid-
daugh*, 8 Colo. App. 223; *Johnson v. Gulick*, 46 Neb. 817. In other States the charge of fraudulent intent in actions for deceit may be maintained by proof of a statement made as of a party's own knowledge which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge, in which case it is deemed that the fraud consists in stating that the party knows the

thing to exist when he does not know it to exist, and in such cases a belief of its existence will not warrant or excuse a statement of actual knowledge. *Fisher v. Mellen*, 103 Mass. 503; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; *Hadock v. Osmer*, 153 N. Y. 604; *Bullitt v. Farrar*, 42 Minn. 8. It is also held in these States that if the representations were not made as of the party's own knowledge, then the evidence must show that the party knew them to be untrue, and evidence that he had reasonable cause to believe that they were untrue will not constitute sufficient proof of *scienter*. *Pearson v. Howe*, 1 Allen, 207; *Stone v. Denny*, 4 Met. 15; *Tryon v. Whitmarsh*, 1 Met. 1; *Marsh v. Falker*, 40 N. Y. 562; *Marshall v. Fowler*, 7 Hun, 237; *McKown v. Furgason*, 47 Iowa, 636. The question was considered by this court in *Wheeler v. Baars*, 33 Fla. 696, and the defendant in error relies upon the decision in that case in support of the position assumed by him in this one. It is there said that the *scienter* may be proved by showing, first, actual knowledge of the falsity of the representation by defendant; second, that defendant made the statement as of his own knowledge, or in such absolute unqualified and positive terms as to imply his personal knowledge of the fact, when in truth defendant had no knowledge whether the statement was true or false; or, third, that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation. Under each phase the proof must show that the statement was in fact false, and in addition, under the first, that defendant had actual knowledge that it was false; under the second, that defendant made the statement as of his own knowledge, when in fact he had no knowledge whether it was true or false, which seems to bear a close resemblance to the English rule, "without belief in its truth, or recklessly careless whether it be true or false;" and under the third, that defendant's special situation or means of knowledge were such as made it his duty to know as to the truth or falsity of the representation. From this statement it is quite evident that proof sufficient to sustain the third phase tends very strongly to sustain the idea that the defendant had actual knowledge of the falsity of his statement; for when it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes from the existence of these facts that defendant had actual knowledge of the falsity of his statement, or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which

such actual knowledge is inferred. We are therefore of opinion that proof of *scienter* in the third phase does not give another or different right or ground of action from that given by proof under the first phase, but that it simply establishes the same ultimate fact, viz., knowledge, by a different class of evidence, and consequently that an allegation that defendant "knew" his representation to be false is provable by evidence embraced in the third phase. In other words, an averment that defendant's situation or means of knowledge were such as made it his duty to know whether his statement was true or false, and an averment that defendant well knew his statements to be untrue, are but different methods of stating the same ultimate fact, viz., knowledge.

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COWLEY V. SMYTH.

(46 New Jersey Law, 380.—1884.)

ACTION against a director of a bank to recover damages for false representations as to the insolvency and condition of the bank, whereby plaintiff was induced to leave in the bank moneys on deposit, and lost same through the failure of the bank.

The certificate from the Circuit presents the following charge to the jury for the opinion of this court:

1. That if the defendant made the representations as matter of his own knowledge, and so positively asserted that he knew the fact to be as he represented, and the fact was not as he represented, although he may not have known them to be false, and the plaintiff acted upon the representations, they not being true, and suffered damage, the plaintiff may recover.

2. That if he asserted the fact as to the condition of the bank of his own positive knowledge, and did not in fact know what its condition was, then the plaintiff, acting upon that, and being injured, would be entitled to recover.

DEPUE, J. This action is an action on the case for deceit. There is a distinction between relief, either affirmative or defensive, in courts of equity, on the ground of fraud, and the remedy for fraud in a court of law. Courts of equity grant affirmative relief by way of reformation or cancellation of instruments, and even defensive relief in proceedings to enforce an obligation or liability, on the ground of constructive fraud, such as would afford no relief in law, especially by action for deceit.

2 Pom. Eq., § 872; *Arkright v. Newbold*, L. R., 17 Ch. Div. 302, 317, 330; *Redgrave v. Hurd*, 20 id. 1, 12. *Reese River Silver Mining Co. v. Smith*, L. R., 4 H. of L. Cas. 64, in which Lord CAINS held that "if persons make assertions of facts of which they are ignorant, whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue," is an instance of equitable relief by way of rescission. The bill was filed by a subscriber for stock to be relieved from a subscription induced by false representations as to the property of the corporation. In that case, as appears in the report in L. R., 2 Ch. App. 604, the directors issued the prospectus containing the false statement on the faith of representations of the vendor of the property and without any knowledge of their untruth, and a subscriber for stock, who was misled by the representations, was relieved in equity from this subscription. The doctrine of equitable estoppel, or estoppel *in pais*, which has been adopted by courts of law from the courts of equity, also presents considerations which do not apply to an action for deceit. The theory on which that doctrine is founded is that a party should not be allowed to retract an admission or affirmation which was intended to influence the conduct of another, if the retraction would materially injure the latter. *Phillipsburg Bank v. Fulmer*, 2 Vroom, 52, 55; *Campbell v. Nichols*, 4 id. 81, 87. The cases which hold that an agent who, without competent authority, induces another to contract with him as the agent of a third party, is liable in damages without regard to his moral innocence in the supposition that he had the authority he assumed to have, also rest on a special ground—on the ground of an implied warranty of authority. *Randall v. Trimen*, 16 C. B. 786; *Collen v. Wright*, 8 E. & B. 647, 656; *Richardson v. Williamson*, L. R. 6 Q. B. 276, 279; *Weeks v. Propert*, L. R. 8 C. P. 427. The observation of Lord HATHERLY that "if a man misrepresents a fact, to that fact he is bound if any other person, misled by such misrepresentation, acts upon it and thereby suffers damage," was made with respect to cases of this kind. *Beattie v. Lord Ebury*, L. R. 7 H. of L. Cas. 102, 130.

The action of deceit, to recover damages for a false and fraudulent representation, differs in principle from the cases that have been referred to. In such an action a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentation to support the action. *Pasley v. Freeman*, 3 T. R. 51, and *Haycraft v. Creasy*, 2 East, 92, are the leading cases on this subject. Both of these cases were decided by a divided court. In *Pasley v. Freeman* the question arose on a motion in arrest of judgment. The count in the declaration which gave rise to the motion averred that the defendant, "intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage the plaintiffs to sell and deliver to one J. C. F.

divers goods . . . upon trust, and did for that purpose . . . falsely, deceitfully and fraudulently assert and affirm to the plaintiffs that the said J. C. F. . . . was a person safely to be trusted and given credit to, and did thereby falsely, deceitfully and fraudulently cause and procure the plaintiffs to sell and deliver the said goods . . . upon trust and credit to the said J. C. F.” The count also contained an averment that J. C. F. was not a person safely to be trusted and given credit to, and that the defendant well knew the same. The court held that a false affirmation, made with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit, and that as a matter of pleading, *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient, but that the fraud must be proved. *Haycraft v. Creasy* was before the court on a rule for a new trial, after a verdict for the plaintiff. In that case the defendant, to an inquiry by the plaintiff concerning the credit of another, made the representation that the party might safely be credited, and that he spoke this from his own knowledge and not from hearsay. The court (GROSS, LAWRENCE and LE BLANC, JJ., Lord KENYON dissenting), held that the action could not be maintained, it appearing that the representation was made by the defendant *bona fide* and with a belief of the truth of it. GROSS, J., said, “It is true that the defendant asserted his own knowledge upon the subject; but consider what the subject matter was of which that knowledge was predicated. It was concerning the credit of another, which is a matter of opinion. When he used these words, therefore, it is plain that he meant only to convey his strong belief in her credit, founded upon the means he had of forming such opinion and belief. There is no reason for us to suppose that, at the time of making those declarations, *he meant to tell a lie and mislead the plaintiff*. LAWRENCE, J., said, “The question is whether, if a person asserts that he knows such a one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in consequence of such misrepresentation. . . . Stress has been laid on the defendant’s assertion of his own knowledge of the matter; but persons in general are in the habit of speaking in this manner without understanding knowledge in the strict sense of the word in which a lawyer would use it. . . . In order to support the action the representation must be made *malo animo*. It is not necessary that the party should gain anything for himself by it. If he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be *something more than misapprehension or mistake*.” LE BLANC, J., said, “By *fraud* I understand *an intention to deceive*. Whether it be from any expectation of advantage to the party himself, or from ill

will towards the other, is immaterial. The question here is whether the defendant's *saying that which, critically and accurately speaking, was not true, but not having said it with intention to deceive, brings this case within Paisley v. Freeman. I think not.*"

The Court of Queen's Bench departed from the doctrine of *Haycraft v. Creasy* in two cases, and held that an action at law might be maintained for false representations, though there was neither fraud nor negligence. *Fuller v. Wilson*, 3 Q. B. 57; *Evans v. Collins*, 5 id. 804. But *Wilson v. Fuller* was reversed on error, 3 Q. B. 68, 1009, and the question was finally set at rest in the English courts in *Taylor v. Ashton*, 11 M. & W. 401, and *Ormrod v. Huth*, 14 id. 651. In *Taylor v. Ashton* the suit was against the directors of a banking company for publishing a false report of the condition of the bank. The report had been prepared by the officers of the company, and adopted at a meeting of the directors. The judge charged the jury that they must be satisfied that a fraud—that is, a *moral fraud*—had been committed by the defendants. The jury, under this instruction, found for the defendants, stating, at the same time, that the defendants had been guilty of gross and unpardonable negligence in publishing the report. On motion for a new trial the court held that an untrue representation made for a fraudulent purpose would sustain an action for deceit; that it was not necessary to show that the defendants knew the representation to be false if it was made for a fraudulent purpose, and that the proper question was left to the jury. In delivering the judgment of the court, PARKE, B., said, "It was contended that it was not necessary that moral fraud should be committed in order to render these persons liable; . . . that the jury found the defendants not guilty, but, at the same time, expressed their opinion that the defendants had been guilty of gross negligence, and that that, accompanied with a damage to the plaintiff, . . . would be sufficient to give him a right of action. From this proposition," the learned judge added, "we entirely dissent, because we are of opinion that, independently of contract, no one can be made responsible for a representation unless it be *fraudulently* made." In *Ormrod v. Huth* the action was in case for false representations. The suit arose upon a sale of cotton by sample—the cotton delivered not being equal in quality with the sample. The plaintiff's counsel contended that the delivery of samples not corresponding with the bulk was a false representation of the quality of the cotton, which must be considered, in point of law, as fraudulent, as being *the statement of a fact which the party making it did not know to be true*. The judge directed the jury that unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practiced in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to a verdict. On error the Court of Excheq-

uer Chamber sustained the charge of the judge. TINDAL, C. J., delivering the opinion of the court, said that "the rule to be deduced from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he cannot recover upon a mere representation of the quality, . . . unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think it does not amount to fraud in law." The English courts have considered these decisions as a finality, and it is now there settled that there can be no fraud without dishonest intention—no such fraud as was formerly termed legal fraud. 1 Benj. on Sales (Corbins' ed.), § 638.

The American cases, as might be expected of a subject so prolific of decisions, are not altogether harmonious. Mr. Pomeroy, speaking of the cases I have cited from the Queen's Bench as holding that a representation, false in fact, if acted upon, would support an action, and that the defendant's liability was independent of his knowledge or ignorance of its actual falsity, says, "This theory admitted the possibility of fraud at law where there was no moral delinquency. It denied that moral wrong was an essential element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states. These cases have, however, been overruled, and the theory itself abandoned in England, and generally, if not universally, throughout the states of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation or concealment without some moral delinquency. There is no actual legal fraud which is not also a moral fraud." 2 Pom. Eq. § 884. The English and American cases are fully cited in the notes to *Pasley v. Freeman*, 2 Sm. Lead. Cas. 176—186. They have placed the law on this subject where it was put by *Pasley v. Freeman* and *Haycraft v. Creasy*, and have, I think, upon principle as well as by the great weight of authority, established the law on the rational basis that in the action for deceit, moral fraud is essential to furnish a ground of action.

The principle on which the action for deceit is founded being ascertained, the next consideration is with respect to the proof and the proper instructions upon the evidence; for, whatever the character of the evidence may be—whether it consists of knowledge of the falsity of the representation or some other fraudulent device intended for the purpose of deception—the evidence must be submitted to the jury under proper instructions. And I think much of the apparent conflict in the cases has arisen from the failure to discriminate between the issue to be proved and the force and effect of the evidence presented.

The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The *scienter* as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff. *Foster v. Charles*, 6 Bing. 396; *S. C.* 7 *id.* 105; *Polhill v. Walter*, 3 B. & Ad. 114; and *Mylne v. Marwood*, 15 C. B. 778, are cases of this kind. In each of these cases the proof was that the representation was false to the knowledge of the defendant. The jury added to its finding an expression of opinion that there was no fraudulent intent, but the court nevertheless entered judgment for the plaintiff on the ground that a wilful falsehood was a fraud. The language of Lord CAMPBELL in *Wilde v. Gibson*, 1 H. of L. Cas. 605, 633, was directed to cases of this aspect; and JESSEL, M. R., in a case where it was proved that the representation was untrue to the defendant's knowledge, refused to receive evidence that he in fact believed it to be true. *Hine v. Campion*, L. R. 7 Ch. Div. 344.

In other cases of actionable frauds, the probative force and effect of the evidence to establish the fraudulent intent will depend upon the circumstances of the particular case. This question is presented in a complex form where the defendant has added to a representation—which turns out to be untrue, but was not false to his knowledge—an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in *Haycraft v. Creasy*, "is to be taken *secundum subjectam materiam*, as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds." In such a case the question is wholly one of good faith. The form of the affirmation will cast the burden of proof on the defendant, but when the evidence is in, the issue is whether the defendant *honestly* believed the representation to be true. In support of such an issue the

defendant may, by way of exculpation, resort to evidence not admissible in actions for other kinds of deceit. He may, as in *Haycraft v. Creasy* give evidence that the person whose ability he affirmed lived in a style, and with such appearances of property and means, as gave assurances of affluence. He may give in evidence the information he had upon the subject, *Shrewsbury v. Blount*, 2 M. & G. 475, and show the general reputation for trustworthiness of the person whose credit he affirmed. *Sheen v. Bumpsted*, 2 H. & C. 193. In fine, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief, leaving the question to be determined, upon all the evidence, whether his conduct was *bona fide*—whether, at the time he made the representation, he honestly believed that his representation was true.

The Massachusetts cases cited to support the instruction certified to the court admit the distinction I have referred to. In *Tryon v. Whitmarsh*, 1 Metc. 1, which was an action for false and fraudulent representations as to the credit of third persons, whereby the plaintiffs were induced to give them credit, a verdict for the plaintiffs was set aside for the reason that the judge should have instructed the jury that the defendant would not be liable if they were of opinion, from the evidence, that he gave an honest opinion, and believed that the persons recommended were trustworthy. In *Hazard v. Irwin*, 18 Pick. 96, the false representation was by a vendor, on the sale of an engine, with respect to its condition. He made the representation as of his own knowledge. The condition of the engine was a fact the vendor could easily have ascertained. The court, (SHAW, C. J.,) cited *Haycraft v. Creasy*, and distinguished it from the case in hand in that the subject matter of the representation was “one of fact in respect to which a person can have precise and accurate knowledge, and in respect to which, if he speaks of his own knowledge, and has no such knowledge, his affirmation is essentially false. In *Page v. Bent*, 2 Metc. 371, the false representation was in relation to the nature and amount of the assets assigned by the defendants. The condition and amount of the assets were peculiarly within the knowledge of the defendants. The court, (SHAW, C. J.,) said, “The principle is well settled that if a person make a representation of a fact as of his own knowledge, and such representation is untrue, . . . it is a fraud and deceit for which the party making it is responsible. . . . But in a matter of opinion, judgment or estimate, if he states a thing of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter misstated is not true. The reason is that it is apparent from the subject matter that what is thus stated as knowledge must be considered and understood by the party to whom it is addressed as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense cannot be had.” In *Stone v. Denney*, 4 Metc. 151, the action was on a false rep-

resentation on a sale of property made by the defendant, on a schedule exhibited which he represented as correct of his own knowledge. DEWEY, J., in his opinion, referred to the Massachusetts cases and said, "From an examination of those cases and others bearing upon the question, I apprehend, however, that it will be found that no real change has been sanctioned in the great and leading principles of law applicable to cases of deceit, and that now, as formerly, to charge a party in damages for a false representation, . . . it must appear that it was made with a fraudulent intent, or was a wilful falsehood." The illustration he gives is "of one asserting as of his own knowledge a matter of which he has no knowledge, nor any sufficient ground for making the assertion." The subsequent observation of the learned judge, "That if one positively affirms a fact as of his own knowledge, and his affirmation is false, his representation is deemed fraudulent," is unobjectionable as applied to the facts of that case, where, because of the subject matter of the representation, the affirmation of knowledge was to be taken in its strict sense, and not as only a strong expression of belief.

The principle adjudged in *Haycraft v. Creasy* is applicable to actions against directors for false and fraudulent representations concerning the financial condition of the institutions in their charge. It was so applied in *Taylor v. Ashton*, which has become a leading case in the English law. The affairs of such an institution must necessarily be entrusted to executive officers and subordinate agents, and the directors generally cannot know, and have not the requisite ability to learn, by their own efforts, the exact condition of the affairs of the company, and it has been found that no vigilance on their part has been adequate to protect these institutions from frauds and peculations covered up and concealed by false entries and false reports. A representation by a director that the institution is in a sound and solvent condition within his own knowledge possesses the legal characteristics of the like representation as to the credit and financial ability of a third person, such as was before the court in *Haycraft v. Creasy*, and it must be subject to the same legal rule.

The facts on which this case was founded were these: the plaintiff was a depositor in the bank. About the 1st of August, 1878, there was a rumor in circulation affecting the condition of the bank. The defendant was one of the directors of the bank, and a member of the finance committee. The plaintiff, having heard the rumor, went to the defendant and told him of the rumor in circulation, and that he was a depositor and did not want to lose his money, and proposed to take it out. The defendant said, "It can't be so, unknown to me and Mr. Monks, we are on the finance committee. There can be nothing wrong with that bank unknown to me and Mr. Monks. Don't believe any of these false reports; believe me; take my word for it. The bank is good, paying six per cent.—the best in the state. If all that is in Jersey tells you the

bank is bad, don't believe it till I tell you." He also said "there was a surplus of over \$6,000 after the dividends were paid." The bank continued to pay all demands down to November 1st, 1878, when it went into the hands of a receiver. It was insolvent on the 1st of August, 1878, when these representations were alleged to have been made.

The defendant was a director of the bank from June 8th, 1869, until its suspension in November, 1878, and a member of the finance committee from November 19th, 1877. The duties of the finance committee were to attend to all applications for loans, and to look after the investing of the company's funds. The general charge and government of the bank devolved upon the executive committee, of which the defendant was not a member. There was no evidence that the defendant had actual knowledge of the condition of the bank. On the contrary, the proof was that at a regular meeting of the directors, on the 31st of May, 1877, the president read his statements, showing a surplus of \$6,000, and a motion was adopted declaring a dividend of six per cent. The next regular meeting was on the 19th of November, 1877. It appears by the minutes that a statement of the assets and liabilities was read in detail, and a dividend of six per cent. per annum was declared for the six months ending October 31st, 1877. On May 30th, 1878, another meeting of directors was held, at which the minutes of the last meeting were read and approved, and a dividend at the rate of six per cent. for the six months ending April, 1878, was declared. All these dividends were credited, and were paid to such of the depositors as presented their books. The defendant was present at each of these meetings of the directors.

On these facts the defendant was not entitled to the nonsuit he asked for; but he was entitled to a different instruction to the jury. The case cannot be distinguished from *Haycraft v. Creasy* and *Taylor v. Ashton*, and it should have been left to the jury to say whether, upon the evidence, the defendant made the representations with a fraudulent purpose to deceive, or whether he made them in good faith and in the honest belief that they were true.

There will be a certificate accordingly. ¹

¹ See *Hadcock v. Osmer*, 153 N. Y. 604, *post*.

CHATHAM FURNACE CO. v. MOFFATT.

(147 Massachusetts, 403.—1888.)

C. ALLEN, J. It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist, and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles. *Cole v. Cassidy*, 138 Mass. 437; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Milliken v. Thorndike*, 103 Mass. 382; *Fisher v. Mellen*, 103 Mass. 503; *Stone v. Denny*, 4 Met. 151; *Page v. Bent*, 2 Met. 371; *Hazard v. Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, among others. *Cooper v. Schlesinger*, 111 U. S. 148; *Bower v. Fenn*, 90 Penn. St. 359; *Brownlie v. Campbell*, 5 App. Cas. 925, 953, by Lord BLACKBURN; *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64, 79, 80, by Lord CAIRNS; *Slim v. Croucher*, 1 De G. F. & J. 518, by Lord CAMPBELL. See also *Peek v. Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and debris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out and visible when the bed was free from water and debris. The material point was, whether this mass of iron ore, which did in truth exist under ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy these representations, if it had been in the

land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of the survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of *Milliken v. Thorndike*, 103 Mass. 382, bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice COLT, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff [the lessor] had superior means of knowledge, and the language in which it was made contained no words

of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled.

INTENTION.

FOSTER V. CHARLES.

(7 Bingham, 105.—1830.)

DECEIT. The declaration alleged certain false representations by the defendant whereby plaintiffs, merchants in London, were induced to engage one Jacque as their agent at Manchester. Plea, the general issue.

At the trial before TINDAL, C. J., London sittings after Michaelmas term, it appeared that in November or December, 1824, the defendant, a soap manufacturer, called on the plaintiffs, wholesale tea dealers, with whom he was on terms of intimacy, and after asking them if they did business at Manchester, said "he had a young friend for whom he was anxious to procure a commission in the tea trade at Manchester: a nice young man; who had an excellent connection there, and would be a great acquisition to any person who wanted to do business there: the defendant being on such terms with the plaintiffs, he had offered it to them before he proposed it to Smith and Co., a respectable house in the same line of business; that Smith and Co. would jump at the offer; that his friend was so excellent a young man, that he would rather trust him without security than most men with; that this young man had been doing business at Manchester for a London tea house, who could no longer execute his extensive orders; that he had an uncle at Manchester, a clergyman of the Scotch Church, who would afford him great facilities in the way of business, and knew all the Scotch travellers in the trade; that defendant would like him to sell soap for defendant and his partner, but feared his other connections would not allow him time."

The plaintiffs said they had an objection to giving commissions; but the very strong recommendation defendant had given of his friend would induce them to think of it.

Accordingly, in the beginning of 1825, the plaintiffs employed James

Jacque, the defendant's young friend, to do business for them on commission at Manchester. But by the middle of 1827, after repeatedly sending incorrect statements of the amount of his receipts on their behalf, he contrived to be a defaulter to them to the extent of £900 and upwards, and to involve them in bad debts to a much greater amount.

He then took the benefit of the insolvent debtors' act.

Instead of having been employed in the Manchester commission tea trade in the year 1824, as the defendant had stated to the plaintiffs, it appeared that he had, at the recommendation of the defendant, been taken into partnership without any capital by Mr. R. C. Stewart, a warehouseman in London, in July, 1823; but great losses having been incurred in that concern, aggravated by a robbery to some amount, Mr. Stewart closed the concern and dissolved the partnership in October, 1824.

Jacque was then indebted to Stewart in the sum of £800, which he undertook by deed dated November 13, 1824, to pay by instalments, in two, three, and four years; but nothing was ever paid.

All this was known to the defendant, who had acted throughout for Jacque, and had negotiated the terms of the dissolution of partnership.

Letters were also put in, written by the defendant to Jacque, after the exposure of the Manchester transactions, in which the defendant exhorted Jacque to write various falsehoods to the plaintiffs with a view to the exculpation of the defendant, and to conceal from the plaintiffs his knowledge of some of the transactions at Manchester.

When the defendant was first applied to on the subject by the plaintiffs, he expressed his regret that his house should have been the means of introducing an unworthy agent to the plaintiffs; but that as they had been instrumental in bringing the loss on the plaintiffs, he would see his partner on the subject, and see what could be done towards relieving them from it. No step of that kind having been taken, the present action was commenced.

TINDAL, C. J., told the jury to consider whether the representation complained of by the plaintiffs had ever been made, and if made, whether it was false within the knowledge of the defendant; for unless it were false within his knowledge, the action did not lie.

The jury returned a verdict for the defendant, which was set aside by the court.¹

Upon a new trial, TINDAL, C. J., told the jury that if the defendant made representations concerning Jacque, the tendency of which was to occasion loss to the plaintiff, knowing such representations to be false, and intending thereby to benefit himself, he was guilty of fraud in the common acceptation of the term; if he made such representations,

¹ Facts taken from 6 Bing. 396.

knowing them to be false, without proposing thereby any advantage to himself, but proposing, perhaps, to benefit a third person, he was guilty of fraud in the legal acceptation of the term, and responsible to the plaintiff for any injury resulting from such representations.

The jury thereupon found for the plaintiff, damages £800; but added: "We consider there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptation of the term."

It was contended that this amounted to a verdict for the defendant, and it was therefore moved that the verdict might be so entered.

TINDAL, C. J. No sufficient ground has been laid to induce us to disturb the verdict which has been found for the plaintiff. The application arises on a misconception of what the jury have found. They first deliver a verdict for the plaintiff, with damages, and then add, that in point of fact they consider the defendant had no fraudulent intention, although he had been guilty of fraud in the legal acceptation of the term.

Their attention had been drawn by me to two classes of motives possible on the part of the defendant; first, a desire to benefit himself by making a statement which he knew to be false; secondly, a desire to benefit some third person; and I stated that, although there might be no intention on his part to obtain an advantage for himself, it would still be a fraud, for which he was responsible in law, if he made representations productive of loss to another, knowing such representations to be false.

The jury in finding that he had no intention to defraud mean only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff.

The question, therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood.

It would be most dangerous to hold that he is not.

The confusion seems to have arisen from not distinguishing between what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences; and the verdict, therefore, in this case ought not to be disturbed.

PARK, J. I am of the same opinion. In what fell from this Court

in the case of *Tapp v. Lee*, and upon the former decision of the present case, the doctrine has been laid down most accurately. It would be unfair to take the expressions of the jury, without connecting them with what the Chief-Justice had just presented for their consideration. It is clear that the jury meant to draw the distinction between the sordid motive of personal advantage and the legal fraud which might be committed by a representation false within the knowledge of the speaker, although made without any view to his own advantage. For such a representation the defendant is responsible if mischief ensues, whatever may have been his motive; and as to its being necessary to prove the motive by which he was actuated: when the case was last before the Court, TINDAL, C. J., said, "I am not aware of any authority for such a position, nor that it can be material what the motive was; the law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff."

Here the defendant said, "That his friend was so excellent a young man, that he would rather trust him without security than most men with;" when he knew the contrary to be the fact, he was guilty of a fraud in law in making such a representation; and fraud in law is sufficient to support this action.

GASELEE, J. When this verdict is taken in connection with the direction of the Chief-Justice, there is an end to all doubt as to the meaning of the jury, and the finding is a perfect finding. What the jury meant by actual fraud was a sordid regard to self-interest; but the legal fraud, which is sufficient to sustain the action, was complete when the intention to mislead was followed by actual injury.

BOSANQUET, J. There seems to me to be no reason for disturbing this verdict. In the course of the trial, it is probable that improper motives had been ascribed to the defendant. The Chief-Justice, therefore, stated to the jury, and stated correctly, that motives of that description in the defendant were not essential to the plaintiff's action. If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law. Coupling that with what the Chief-Justice addressed to the jury, their verdict only means that the defendant did not propose to benefit himself, perhaps intended to benefit another; but that what he said, intending to benefit another, was false within his own knowledge, injurious to the party who received the communication, and, consequently, a fraud in the legal acceptation of the term.

Rule refused.

EATON, COLE & BURNHAM Co. v. AVERY.

(83 New York, 31.—1880.)

RAPALLO, J. This is an action for deceit, in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. *Oazeaux v. Mali*, 25 Barb. 578; *Newbery v. Garland*, 31 Barb. 121; *Bruff v. Mali*, 36 N. Y. 200; *Morgan v. Skiddy*, 62 N. Y. 319; *Commonwealth v. Call*, 21 Pick. 515, 523; *Commonwealth v. Harley*, 7 Metc. 462. The principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts

- thereof, so that the subscribers to the agency, when applied to by a customer to sell goods to him on credit, may, by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A casually or from vanity makes a false or exaggerated statement of his pecuniary means to B, or even if he does so with intent to deceive and defraud B, and B communicates the statement to C. who acts upon it, A cannot be held as for a false representation to C. But if A makes the statement to B for the purpose of being communicated to C, or intending that it shall reach and influence him, he can be so held. In *Commonwealth v. Call*, 21 Pick. 515, the court say on this point at page 523, that the representation was intended to reach P and operate upon his mind; that it did reach him, and produced the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In *Commonwealth v. Harley*, 7 Metc. 462, the prisoner was indicted for obtaining goods by false pretenses from G. B. & Co. The representations were made by one Cameron, in the absence of the prisoner Harley, to a clerk of G. B. & Co., who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A make a false statement of his affairs to B, and then publicly hold out B as his reference, can it be doubted that he would be bound by the communication of his statement by B to any person who might inquire of him in consequence of this reference? That case differs from the present one only in the fact that here there was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the de-

fendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information or whether he gave it on their application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm.

The case is a new one in its facts, but the principles by which it should be governed are well established.

* * * * *

Judgment affirmed.

HADCOCK v. OSMER.

(153 New York, 604.—1897.)

APPEAL from a judgment of the Appellate Division of the Supreme Court, affirming a judgment of the Trial Term in favor of the plaintiff, in an action by the plaintiff, as executor, to recover for fraudulent representations.

VANN, J. Prior to the 15th of September, 1888, Deloss Brown, as principal, and Joseph Brown, as surety, were indebted to the defendant on a past-due note for over \$300 and payment thereof had repeatedly been demanded. After trying in vain to borrow money to pay the note, Deloss told the defendant that he did not know where they could get it, and asked if he must have it. The defendant said yes, and, upon being further asked by Deloss where the money could be had, recommended him to call on one Benjamin Hadcock. He did so and was told by Benjamin that he could not lend the money, but that his brother Emmanuel, who was stopping with him, could let him have it. Deloss reported to the defendant that he thought he could get the money of "the Hadcocks," and that they would let him have it "some time in October." When the time came around, the Messrs. Brown started to see if they could get the money of Emmanuel Hadcock, but first went to the defendant and asked him to go along. He said that he could not, when Deloss declared there was no use of their going alone, and thereupon the defendant wrote and delivered to the Browns a paper,

of which the following is a copy: "Mr. Hadcock: The Browns are good for what money you let them have. [Signed] L. Osmer." The Hadcocks did not know the Browns, but, as they knew the defendant, on the strength of this paper Emmanuel Hadcock lent them \$400, taking their note therefor, and on the same day they used the most of the money to pay their debt to the defendant. Both of the Browns were insolvent at this time, and while the defendant may have believed they were good, he did not know whether they were good or not, and did not try to find out. Upon the trial of this action, which was brought to recover damages for false representations by means of said paper, there was but slight dispute as to the representations, their falsity or the injury resulting therefrom, but the defendant insisted that as he did not know that his representations were false, there could be no recovery against him. Through his counsel, he asked the trial court to charge the jury "that there can be no recovery in an action of deceit unless it appears that the defendant made the representations, knowing them to be false, with intent to deceive and that the plaintiff suffered damages in consequence thereof." The court refused to so charge, except with the modification, "that if he made the statement that they were good, as a fact, not as an opinion, without knowing whether it was true or not, then it was false in the sense that he made a statement of fact as though he knew it to be true, which he did not know to be true. That, together with what I have already said in my charge in regard to it, will enable the jury to understand what I mean." Exception was taken to the refusal to charge as requested and to the charge as made. In the body of the charge, the court after instructing the jury as to the difference between the assertion of a fact and the expression of an opinion, told them in substance that if the defendant made the representation, either knowing it to be untrue, or, without knowing whether it was untrue or not, stating it as an existing fact, intending that it should be taken and acted upon as such, they might infer an intent to defraud; "because," as the court continued, "a man has no right to state a thing as a fact, which misleads the other party to his damage, unless he knows whether it is true or untrue; and if he states it, knowing and understanding that he does not know whether it is true or not, he just as much misleads the other man as though he stated it with the knowledge that it was untrue."

An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception and consequent loss. But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material

fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud. *Kountze v. Kennedy*, 147 N. Y. 124, 130; *Rothschild v. Mack*, 115 N. Y. 1, 7; *Marsh v. Falker*, 40 N. Y. 562, 573; *Bennett v. Judson*, 21 N. Y. 238; Addison on Torts, 1007; 1 Bigelow on Fraud, 514. Such seems to be the case now before us, as the facts are presumed to have been found by the jury. The plaintiff's testator did not ask for information in regard to the solvency of those who wished to borrow money of him, but the defendant volunteered to give it. He was interested in the result of the loan, for the bulk of the proceeds was for his benefit. On being told that the loan would not be made without his presence, he armed the proposed borrowers with a written statement over his own signature, containing a positive assertion of a material fact, with the intention that it should be acted upon and should induce the loan of the money. Yet he did not know the assertion, thus positively made for such an important purpose, to be true, and he did not investigate or seek to discover whether it was true or not, although he had dealt some with the Browns and had some information as to their circumstances. He intended, as the jury has found upon sufficient evidence, that the lender should understand him as communicating his actual knowledge and not as expressing his opinion, judgment or belief. Knowing that he did not know what he said he did, and what he intended to cause another to believe he did, he took the responsibility of its truth, and honesty of belief in the supposed fact, under such circumstances, cannot relieve him from the imputation of falsehood and fraud. As was said by Judge PECKHAM, in *Rothschild v. Mack*, *supra*: "He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and indorsers, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement. . . . He certainly meant to convey the impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false or else he was conscious that he had no actual knowledge while assuming to have it and intending to convey such impression. If damage ensue this makes an actionable fraudulent representation." The language of Chief Judge ANDREWS, in *Kountze v. Kennedy*, *supra*, is equally applicable: "One who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an ex-

ception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results." The rule is the same in other states and in England. Thus, in *Chatham Furance Co. v. Moffatt*, 147 Mass. 403, the court said: "The charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely matter of opinion, estimate or judgment, but is susceptible of actual knowledge, and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist, and if he does not know it to exist he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." See also, *Bullitt v. Farrar*, 42 Minn. 8; *Hexter v. Bast*, 125 Pa. St. 52; *Wells v. McGeoch*, 71 Wis. 196; *Swayne v. Waldo*, 73 Ia. 749; *Craig v. Ward*, 1 Abb. Ct. App. Dec. 454; *Evans v. Edmonds*, 13 C. B. 777.

The charge of the learned trial judge was within these rules, and the exceptions under consideration furnish no grounds for a reversal of the judgment.

The court was further asked to charge that "there can be no recovery in this case in any event, unless it be proven or be found that there was an actual purpose or intent on the part of the defendant, on the 15th day of September, 1888, to defraud Emmanuel Hadcock of his property." The court so charged, but added: "Of course, that is in connection with what I have already charged, that it was not necessary it should have been determined, when he made the paper, before they got the money, as to which of the Hadcocks it was to go, but there must have been an intention to cheat and defraud the person to whom this paper should be delivered, the one or the other." The defendant excepted to the modification and now argues that it was reversible error.

In the course of his charge the trial judge had said: "If it was understood by the defendant that there was a proposition to borrow of one or more Hadcocks, and he sent out a general paper addressed to Mr. Hadcock, why then you can say whether it was not fairly intended to be delivered to such person of the family as would loan the money; and, if that is true, it is not essential that it should appear to you that it had been determined, at the time the paper was drawn, that the loan should be from one or the other. If you find that fairly the meaning, intention and design of the parties was that whoever loaned the money should

have this paper presented to him, then it may be fairly said that the representation was made to whoever did loan the money to those persons." While the defendant had at first suggested that the money might be borrowed of Benjamin Hadcock, he was finally told that "the Hadcocks" would probably make the loan. Since the brothers lived together as members of the same family and the paper was addressed generally to "Mr. Hadcock," it was properly left to the jury to find whether it was not the intention of the defendant that the paper should be delivered to such member of the Hadcock family as would make the loan, which was the primary object of giving the writing. As a general recommendation of credit, knowingly given to an insolvent person, will support an action for deceit in favor of any one acting thereon to his injury, so, as we think, a letter addressed simply to "Mr. Hadcock," would justify any man of that name in acting upon it, at least when it was delivered to him with the apparent authority of the writer and there was no direction from the latter as to which one of the Hadcocks it should be given. Moreover, the evidence warranted the inference that the Browns had implied authority from the defendant to deliver the letter to either one of the Hadcocks and hence to the plaintiff's testator.

We agree with the conclusion reached by the learned Appellate Division and think that their judgment should be affirmed, with costs.

All concur except O'BRIEN, J., who takes no part, and GRAY, J., absent.

Judgment affirmed.

HUNNEWELL v. DUXBURY.

(154 Massachusetts, 286.—1891.)

ACTION for deceit. Judgment for plaintiff. Defendants excepted, and exceptions sustained.

BARKER, J. The action is tort for deceit in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to \$150,000, had been paid in, and that patents for electrical advertising devices of the value of \$149,650 had been transferred to it.

From the exceptions it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate dated August 11, 1885, required by St. 1884, c. 330, § 3, signed by the defendants, with a *jurat* stating that on that date they

had severally made oath that the certificate was true to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records, and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under St. 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants or the corporation to the public or the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the state.

The terms of the statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. St. 1829, § 90; Rev. St. c. 38, § 28; Gen. St. c. 60, § 30; St. 1870, c. 224, § 38, cl. 5; Pub. St. c. 106, § 60, cl. 5. To hold that St. 1884, c. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate, which is a condition of its admission, the added liability of an action of deceit, is to read into the statute what it does not contain.

If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In *Fogg v. Pew*, 10 Gray, 409, it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In *Bradley v. Poole*, 98 Mass. 169, the representations proved and relied on were made personally by the defendant to the plaintiff in the course of the negotiation for the shares the price of which the plaintiff sought to

recover. *Felker v. Standard Yarn Co.*, 148 Mass. 226, was an action under Pub. St. c. 106, § 60, to enforce a liability explicitly declared by the statute.

Nor do we find any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: (1) Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. (2) Those persons who to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. *Bagshaw v. Seymour*, 4 C. B. (N. S.) 873; *Watson v. Earl of Charlemont*, 12 Adol. & E. (N. S.) 856; *Bedford v. Bagshaw*, 4 Hurl. & N. 537; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Jarrett v. Kennedy*, 6 C. B. 319; *Campbell v. Fleming*, 1 Adol. & E. 40; *Peek v. Derry*, 37 Ch. Div. 541, and L. R. 14 App. Cas. 337; *Angus v. Clifford*, 2 L. R. Ch. 449. In these cases the representations were clearly addressed to the plaintiffs, among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. *Morgan v. Skiddy*, 62 N. Y. 319; *Terwilliger v. Telegraph Co.*, 59 Ill. 249; *Paddock v. Fletcher*, 42 Vt. 389. The numerous cases cited in the note to *Pasley v. Freeman*, 2 Smith, Lead. Cas. (9th Amer. Ed.) p. 1320, are of the same character.

In the case at bar the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the state a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents, and be induced by them to take the notes. It is not such a representation made by one to another with intent to deceive as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case, and makes it unnecessary to consider the other questions raised at the trial.

Demurrer and exceptions sustained.

RELIANCE.**ENFIELD V. COLBURN.**

(63 New Hampshire, 218.—1884.)

CASE. The declaration alleged that the defendant falsely and fraudulently made a claim upon the town for damages to his horse while travelling on a highway in said town, and falsely stated to the officers of the town that his horse had been injured through the insufficiency of the highway, and falsely swore to an affidavit stating the particulars of said injury, which he filed with the town-clerk of said town, "and said town, relying upon said false and fraudulent representations, so made by said defendant, incurred large expense in investigating the facts represented by said defendant, and found said representations to be false and that said defendant's horse was not injured through the insufficiency of the highway in said town as said defendant well knew." The defendant demurred.

CARPENTER, J. A mere naked lie—a falsehood—though told with intent to deceive, upon which nobody is deceived, is not actionable. The declaration alleges, in substance, that the defendant falsely and fraudulently represented that he had a valid claim against the plaintiffs for damages, that the plaintiffs relied upon the representations, and that they investigated them at a large expense and found them to be false. One or the other of the last two allegations is as untruthful as the representations are claimed to be: both cannot be true. If the plaintiffs relied upon the representations, they did not investigate them: if they investigated them, they did not rely upon them. It is a perversion of language to say that they did both. The averments are incurably repugnant, and neither of them can be rejected as surplusage.

If the inquiry had resulted in favor of, instead of against, the validity of the defendant's claim, and if, relying upon the result of the examination and not upon the representations, the plaintiffs had paid the demand, they could maintain no action however unfounded the claim and however false and fraudulent the defendant's representations might be. He only who has trusted in and acted upon a falsehood to his injury can maintain an action. It is upon this principle that no action lies for false representations of facts which are equally open to the observation and knowledge of both parties.

If this declaration can be sustained, a plaintiff who makes and institutes a suit upon a false and fraudulent claim, and is beaten, must not only satisfy the judgment against him for costs, but is also liable to an action on the case; and, generally, one may recover the cost of

detecting and defeating any fraud which may be attempted upon him. There is no precedent for such an action. It is always at a party's option to act upon the faith of statements made to him, or upon his own judgment of the facts after making full inquiry. If, where he does the latter and makes a mistake, another is not answerable for his blunder, whatever pains he may have taken to lead him into it, still less should he be punished if by reason of the inquiry no mistake is committed. It is the damages which result from acting upon false representations as if they were true, and not the expense of detecting their falsity, which a plaintiff is entitled to recover.

STANLEY, J., did not sit: the others concurred.

Demurrer sustained.

HUMPHREY V. MERRIAM.

(32 Minnesota, 197.—1884.)

MITCHELL, J. This was an action for damages for deceit in the sale of stock of the Florence Mining Company. The deceit consisted, as alleged by plaintiff, in the false and fraudulent statements of one Carver, defendant's agent, who made the sale, as to the value, condition, and productiveness of the company's mine, and as to the amount of its indebtedness. Assuming that the alleged representations were made, and that they were untrue, (of which facts there was competent evidence,) and that they were material, (which some of them undoubtedly were,) it was incumbent on plaintiff in such an action also to prove (1) that they were fraudulently made; and (2) that he believed them, and relied on them in making the purchase.

* * * * *

We think the evidence utterly fails to show that plaintiff believed these representations, and relied on them in making the purchase. It is true that in his examination in chief he states generally that he relied on them; but his cross-examination conclusively shows that he did not rely on them as true when he made his purchase. He makes the following among other statements: "I wouldn't let him [Carver] touch the money; wouldn't take his word that he was agent for the man. I considered that what he said was wind. I saw a good many men to see how far Carver's representations were corroborated. I was anxious to see how I could protect myself and take the stock. I didn't intend to take Carver's word that he was Merriam's agent. I wanted to see that I was dealing with a responsible man. These re-

presentations of Carver's were as the wind, unless they were certified to by the character of an honest man. I didn't mean that he should get any money, and I meant that Mr. Merriam should get my money, and should have the right to say that these things were true." Again, when asked if he would believe anything Carver said, he answered, "No." When he went to see Merriam he says he made him the speech which had been taught him by his attorneys on a former occasion; "I have bought of you, through your agent, Mr. Carver, some Florence." When asked his object in making this speech, he replied, "To see whether he would say that Carver was or was not his agent." The evidence also shows that, so far from believing the statements of Carver, he interviewed numerous other parties, stockholders and others, to ascertain what they knew about the mine, and what value they placed upon the stock, and that, so far as he made the purchase upon a *belief in the existence of facts*, he acted upon what information he got from the parties, and not upon what Carver told him.

The evidence clearly shows the plaintiff's position to be just this: He knew that mines were proverbially uncertain, and might prove very profitable or a failure. He found that others had faith in the mine, and therefore he had; but he wished something more certain, and wanted a warranty from a responsible man, so that he could keep his stock and get his dividends from the mine if it turned out well, or get his money back from the defendant if it did not. Whatever may have been plaintiff's belief as to the condition or value, present or prospective, of the mine, that belief was not based upon the statement of Carver. His only reliance upon Carver's statements consisted not, in his belief of their truth, but because he thought, if false, Merriam would be responsible for them. He made his purchase, not because of any belief in their truthfulness, but because he thought Merriam would be liable as warrantor to make them good if they proved untrue. On such a state of facts as the court below well remarked, if plaintiff made out anything it was a cause of action on a warranty and not for deceit.

On either or both of these grounds the action was properly dismissed.

* * * * *

Judgment affirmed.

TAYLOR V. GUEST.

(58 New York, 262.—1874.)

APPEAL from an order of the General Term of the Supreme Court, reversing a judgment in favor of the defendant entered upon the report of a referee. (See 45 How. Pr. 276.)

ANDREWS, J. The cause of action set forth in the complaint is, that the defendant undertook, as the broker and agent of the plaintiff, to sell the bonds, and that he accounted to the plaintiff, as upon a sale, at sixty per cent of their par value, when in fact he sold them at seventy-five per cent of that value. It is alleged that when the plaintiff delivered the bonds to the defendant to be sold, the defendant represented that sixty per cent was the highest price he could obtain for them, and that the plaintiff relying upon that representation, authorized a sale at that price; that this representation was false and fraudulent, and that at the time it was made the defendant had received and accepted a bid for them at seventy-five per cent, on which he subsequently delivered them and received the purchase-money; but which fact he fraudulently concealed from the plaintiff.

The complaint is based upon the theory that the relation of principal and agent existed between the parties to the transaction, and not that of vendor and purchaser. The referee found that the defendant was not the agent of the plaintiff to sell the bonds, but that the plaintiff by his agents agreed to sell them to the defendant at sixty cents on the dollar, and that they were sold to him at that price; and that the subsequent sale to *Drew* was made by the defendant as owner, and not as the broker or agent of the plaintiff. The finding of the referee is conclusive against the plaintiff upon the cause of action set out in the complaint. The evidence was conflicting in respect to the question whether the defendant was the buyer of the bonds from the plaintiff, or merely his agent to sell them, and this court cannot review the finding of the referee upon that question.

The plaintiff seeks to maintain the judgment of the General Term, which reversed the judgment entered upon the report of the referee, on the ground that, conceding that the defendant was the purchaser of the bonds, he was, upon the facts found in the report, guilty of deceit in the purchase, occasioning damage to the plaintiff, for which judgment should have been given him. This ground of action is entirely distinct from the one on which the plaintiff relied when he commenced his action; but assuming that if maintained by proof, the referee should have rendered judgment upon it, we are to consider whether the facts

found by him establish a cause of action for deceit against the defendant. In determining this question we can look only to the facts contained in the report. We can look into the case to see whether there is any evidence to sustain the findings, but not to ascertain whether any additional fact was proved, which if found, would in connection with the fact contained in the report have made out a cause of action and required a different judgment. *Fabbri v. Kalbfleisch*, 52 N. Y. 28, and cases cited. The case is not brought within the exceptions which exist when the appeal is from an order granting a new trial on the facts, or when there was a request to make additional findings, which was denied.

The referee, in respect to the fraud alleged, found that the agent of the defendant, who was concerned in the negotiation on his behalf for the purchase of the bonds, knowing that one *Drew* had offered the defendant seventy-five per cent for them, to induce the plaintiff to sell them to the defendant for sixty per cent, told the plaintiff's agent who made the sale, and during the negotiation, that the latter sum was the highest price at which the bonds could be sold. This false representation, made fraudulently and with an intent to deceive, made the defendant liable in an action for deceit if, believing it to be true and relying upon it, the plaintiff parted with the bonds for the price agreed upon, and when, except for the false representation he would not have sold them, and might have realized a larger price. Fraud without damage or damage without fraud will not sustain the action for deceit (3 Bulstr. 95); and a false and fraudulent representation made by one party to induce a contract entered into by the other, is not actionable unless the party to whom it was made believed the representation to be true and acted upon the faith of it to his damage. *Scott v. Lara*, Peake's Cases, 226; *Allen v. Addington*, 7 Wend. 11; 11 id. 375; *Meyer v. Amidon*, 45 N. Y. 169; *Oberlander v. Spiess*, id. 1750; *Lefler v. Field*, 52 id. 621. In a legal sense a person is not damaged by a false representation by which he is not influenced. It is incumbent upon the party claiming to recover in an action for deceit, founded upon false representations, to show that he was influenced by them. It does not require very strong proof to establish it. In most cases it may be inferred from the circumstances attending the transaction. But in all cases it is a fact which should be averred in the complaint, and must be maintained by evidence. There is an absence in the report in this case, of any finding, that the plaintiff relied upon the false representation of the defendant's agent, in making the sale, or that it was one of the moving considerations thereto; nor is it a legal inference from the facts found.

The order of the General Term should be reversed, and the judgment on the report of the referee affirmed.

All concur except RAPALLO, J., dissenting, and JOHNSON, J., who took no part.

Order reversed, and judgment accordingly.

BRACKETT V. GRISWOLD.

(112 New York, 454.—1889.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff.

This action was brought by Samuel Bonnell, Jr., plaintiff's intestate, against the defendants, trustees of the Iron Mountain Company, of Lake Champlain, upon a complaint containing three causes of action. The first is founded on the alleged failure of the trustees to file a report as required by law, and to enforce in behalf of the plaintiff, a creditor of the company, the statutory liability arising from such failure imposed by the twelfth section of the act of 1848. The second cause of action is framed under the fifteenth section, and sought to charge the defendants on the ground that the report of the company, made and filed January 13th, 1870, in assumed compliance with the twelfth section, was false in representing that the capital stock of \$2,000,000 had been paid up in full. The third cause of action set forth a conspiracy between the defendants to form a sham corporation to defraud the public and the plaintiff, whereby the plaintiff was deceived and defrauded into giving credit to the company to his injury.

The third count alleged, in great detail, a fraudulent combination between the original defendants and John A. Griswold to organize the "Iron Mountains Company of Lake Champlain" with a nominal capital of \$2,000,000, and to issue the whole stock to the "Kingdom Iron Ore Company" in pretended payment of about 1,300 acres of undeveloped mining land in the county of Essex, owned by the latter company, worth not to exceed the sum of \$50,000, which lands they were to cause to be conveyed to the new corporation, and in which, it is alleged, the defendants and John A. Griswold, as stockholders in the "Kingdom Iron Ore Company," were interested. It is alleged that this device of purchasing the lands by the new corporation for a sum vastly exceeding their value was resorted to to enable the defendants to represent to the public that the whole capital stock of the new corporation had been paid in full, and that, as a part of the fraudulent scheme, persons of known financial and business ability, engaged in the mining and manufacture of iron, were to be made trustees of the company.

It appears from the complaint and evidence, that on the 12th of March, 1870, the "Iron Mountains Company" issued to the "Birmingham Iron Foundry," of Connecticut, its two notes, payable, respectively, at four and six months in the aggregate for \$5,511.66, in consideration of machinery theretofore sold by the foundry company to the "Iron Mountains Company," which notes the payee, before maturity, transferred to Bonnell in exchange for coal. The foundry company when it applied to Bon-

nell to take the notes in exchange for coal, represented to him that they were good, but advised him to inquire of one Ellis, the treasurer of the "Iron Mountains Company," whose office, was in the city of New York. Bonnell inquired of Ellis as to the responsibility of the company, and was informed by him that the company was good and the notes would be promptly paid at maturity. Upon receiving this information he consented to take the notes in payment for coal to be delivered, and afterwards took them, but up to that time he supposed the notes were made by the "Iron Mountains Company of Missouri," but before the transaction was completed ascertained that they were the notes of the New York corporation. The complaint alleges that the "Birmingham Iron Company and the plaintiff were induced to become creditors of said company by said representations so made by said defendants and said John A. Griswold, before mentioned, which he relied upon, and also confiding in the general reputation of said company, produced by said representations and report made to the public at large, and believing in consequence of the premises that said company was possessed of an actual paid up capital of \$2,000,000, and also induced thereto by the fact that said trustees were represented as being interested in said company and were men of large means," etc. There is no evidence of the circumstances under which the notes were taken by the "Birmingham Iron Foundry," except that they were taken for machinery sold. Bonnell testified that when he took the notes he did not know who were stockholders or officers in the "Iron Mountains Company," except that Ellis was treasurer, nor the amount of its capital stock and had never seen the "prospectus," nor any report of the company; in short, that he knew nothing whatever in respect to its property or condition, its officers or stockholders, or of any of the representations made by the defendants or the company.

The complaint avers the insolvency of the company, that the notes have never been paid, and it appears from the evidence that the company was adjudicated a bankrupt in August, 1871, and that its whole property purchased of the Kingdom Company was sold in 1876, on a foreclosure of the trust mortgage, for about \$5,000.

ANDREWS, J. The death of the original plaintiff has eliminated from the complaint the causes of action founded on the statutory liability of the trustees for a failure to make a report, or for making a false report, imposed by the twelfth and fifteenth sections of the general manufacturing corporations act of 1848. So, also, by the death of some of the original defendants, and the discontinuance of the action against others, the action has become one against Chester Griswold alone on the cause of action stated in the third, or conspiracy count in the complaint. This cause of action was substantially one for fraud and deceit

by means of false pretenses, and the right of recovery is governed by the principles applicable to actions of that character. That this is the nature of the action was decided in the case of *Arthur v. Griswold*, 55 N. Y. 400, which was also an action against the present defendant and others, the complaint in which set forth a cause of action similar to that alleged in the third count of the complaint in this action. The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. The *gravamen* is fraud and damage, and not the conspiracy. The means by which a fraud is accomplished are immaterial except so far as they tend, in connection with the damage suffered, to show an actionable injury. The allegation and proof of a conspiracy in an action of this character is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated. But a mere conspiracy to commit a fraud is never of itself a cause of action, and an allegation of conspiracy may be wholly disregarded and a recovery had, irrespective of such allegation, in case the plaintiff is able otherwise, to show the guilty participation of the defendant. In other words, the principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or co-operation. Whenever it becomes necessary to prove a conspiracy in order to connect the defendant with the fraud, no averment of the conspiracy need be made in the pleadings to entitle it to be proved. These principles are well settled. The opinion of Chief Justice NELSON in *Hutchins v. Hutchins*, 7 Hill, 104, contains an elaborate consideration of the subject, and no other authority need be cited.

The question in this case turns upon the point whether the evidence proved or tended to prove a cause of action against the defendant for false and fraudulent representations within the rules governing the common-law actions for fraud and deceit. There is no doubt or question as to what elements are requisite to sustain an action for false pretenses. The essential constituents of such an action have been understood from the time such actions were first maintained. They are tersely stated by CHURCH, Ch. J., in *Arthur v. Griswold*, *supra*, viz.: "Representation, falsity, *scienter*, deception and injury." There must have been a false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he, in good faith, parted with property or incurred the obligation which occasioned the injury of which he complains. All these circumstances must be found to exist, and the absence of any one of them is fatal to a recovery. It is not necessary that the false representation should have been made

by the defendant personally. If he authorized and caused it to be made it is the same as though he made it himself. Nor is it necessary that it should have been made directly to the plaintiff. If it was made to the public at large for the purpose of influencing the action of any individual who may act upon it, any person so acting upon it and sustaining injury thereby may maintain an action. It is on this ground that promoters or directors of corporations have been held liable for false representations in a prospectus, or reports, or other papers issued by the corporation with their sanction, by which individuals have been induced to purchase the stock or become creditors of the corporation, and the fact that the false report or prospectus purports to be the act of the corporation and not of the promoters or directors, does not relieve them from personal responsibility.

In view of the settled principles governing the action for fraud and deceit by means of false pretenses, there is, upon the evidence presented in this case, an insuperable difficulty in maintaining the present judgment. There is no evidence that Bonnell, in purchasing the notes, relied upon any representations made by the defendant. On the contrary, it affirmatively appears that at that time he was wholly ignorant of the alleged fraudulent scheme under which the "Iron Mountains Company" was organized, and had no knowledge or information of any of the acts or representations of the defendant or the other parties to the alleged conspiracy set forth in the complaint. He knew nothing of the property of the company nor of the amount of its capital stock, nor did he know who were the directors or persons interested, and never saw or heard of the report of 1870, or of the prospectus prepared by Remington. The trial judge submitted the question of conspiracy to the jury, and whether the defendant Chester A. Griswold was a party to it and knew of the prospectus, and also, whether he knew, when he signed the report of 1870, that the statement that the capital stock of \$2,000,000 had been paid in full, was false and untrue. It is insisted by the defendant's counsel that the evidence was insufficient to authorize a finding against the defendant Chester A. Griswold on these questions. At the time of these transactions he was a young man, twenty-four years of age, employed by the firm of John A. Griswold & Co., at Troy, and had little, if any, knowledge of mining or mining property, and was made a trustee of the Iron Mountains Company without his knowledge, at the time, and signed the report of January, 1870, at the request of his father, who was largely interested in mining property and in the manufacture and sale of iron. It is claimed that the facts show that the defendant relied wholly upon the statements of his father and Remington, and acted under his father's directions in good faith, believing the representations made in the prospectus and in the report of 1870 to be true. We deem it unnecessary to consider this contention.

The jury have found adversely to the defendant upon these questions of fact. But this does not relieve the case of the difficulty that, assuming the facts to be as found, the plaintiff's case, as proved, fails on the ground that Bonnell, when he took the notes, did not know of the illegal conspiracy or false representations, and consequently was not influenced thereby in making the purchase.

In order to recover in an action for fraud and deceit the fraud and injury must be connected. The one must bear to the other the relation of cause and effect, not, perhaps, in so close a sequence as in actions on contract. But, nevertheless, it must appear in an appreciable sense that the damage flowed from the fraud as the proximate and not the remote cause. In the statutory action against the trustees of a manufacturing corporation organized under the act of 1848, for making a false report, the statute dispenses with the necessity of showing any privity or relation between the act done and the debt sought to be recovered. The liability to creditors is made absolute, and exists irrespective of the fact whether they knew of the falsity of the report or relied upon the statements therein. But the statutory action abated by the death of Bonnell, and the plaintiff can now only pursue his common-law remedy and must abide by the conditions which attend it. The court, in the main charge to the jury, without referring to the rule that in an action for fraud or deceit it must appear that the fraud produced the injury, charged that if the jury found "that there was a conspiracy; that defendant was really a member of it, doing whatever was necessary to do to carry it out, and the object was to get credit for the corporation with the expectation that the debts would not be paid, then he would be liable. If he was not a member of the conspiracy and did not adopt it, then you will render a verdict for the defendant." Subsequently on the request made by the defendant's counsel to charge, "that except the plaintiff relied upon the representations, they did not deceive him or cause him damage," the court replied, "I hold that all he need rely on is that defendant (the company) was duly incorporated and that there was a good company." This was excepted to and the exception was, we think, well taken. It is undoubtedly true that Bonnell took the notes on the assurance of the "Birmingham Iron Foundry," and of Ellis, the treasurer of the "Iron Mountains Company," that the company was good and the notes would be promptly paid at maturity. But neither was the "Birmingham Iron Foundry" nor Ellis the agent of the defendant, nor were they authorized by him to make any representations to Bonnell, and their statements did not bind him, nor was he responsible for them. Ellis is not charged to have been a co-conspirator, and it does not appear that he had any interest as stockholder or otherwise in the "Iron Mountains Company." That his declarations were inadmissible to charge the defendant is clear from the decision in

Arthur v. Griswold, *supra*, where a similar question was decided. It was not enough to entitle the plaintiff to recover that it appeared that Bonnell took the notes believing that the company was good, or because the company was represented to him to be good, unless the representation was traced to the defendant. The complaint states, among other things, that Bonnell took the notes, "confiding in the general reputation of the company produced by the representations," etc. That a corporation or an individual is reputed to be solvent, although in fact insolvent, by reason of which a person purchases individual or corporate securities, is not alone a ground for maintaining an action for fraud against the debtor. Nor is the case, in its legal aspect, strengthened by proof that this reputation was attributable to false appearances put on by the corporation or the individual, or that there was a holding out by them by general representations, or otherwise, that the corporation or individual was solvent and responsible. The law exacts of every individual reasonable care to protect himself before he is permitted to charge another as the author of an injury. In case of false pretenses there must be a specific representation shown upon which the plaintiff relied. General reputation of solvency is quite an insufficient ground of reliance by a person who purchases securities in the market, although that reputation may have sprung from the conduct of the defendant. The case of *Peek v. Gurney*, L. R. 6 E. & I. App. 377, applies with great stringency the rule that to sustain an action for fraudulent representations, a close relation must be shown between the representations and the injury claimed, and, also, that the representations must have been made to influence the conduct of the plaintiff, or of a class of persons in which he was included. That case was much considered, and it was held that false representations contained in a prospectus, issued to induce subscriptions to shares on the organization of a limited company, would not sustain an action in favor of one who was not a party to the original subscription, but who, afterwards, having seen the prospectus, and relying upon it, purchased shares in the market. The judges were of the opinion that, as the prospectus was intended on its face to influence only original subscribers, it was not available to sustain the plaintiff's action, and that the representation, although the remote cause of the injury, was not so connected with it as to constitute, as to the plaintiff, an actionable fraud.

We think the case was submitted to the jury upon a false theory.

The judgment should, therefore, be reversed, and a new trial granted.

All concur.

Judgment reversed.

FOTTLER v. MOSELEY.

(178 Massachusetts, 295.—1901.)

DECREE. Verdict directed for defendant, and plaintiff alleged exceptions.

HAMMOND, J. The parties to this action testified in flat contradiction of each other on many of the material issues, but the evidence in behalf of the plaintiff would warrant a finding by the jury, that on March 25, 1893, the plaintiff, being then the owner of certain shares of stock of the Franklin Park Land and Improvement Company, gave an order to the defendant, a broker who was carrying the stock for him on a margin, to sell it at a price not less than \$28.50 per share; that on March 27 the defendant, for the purpose of inducing the plaintiff to withdraw the order and refrain from selling, represented to the plaintiff that the sales which had been made of said stock in the market had all been made in good faith and had been "actual true sales throughout;" that these statements were made as of the personal knowledge of the defendant, and that the plaintiff, believing them to be true and relying upon them, was thereby induced to and did cancel his order to the defendant to sell, and did refrain from selling; and that the statements were not true as to some of the sales in the open market, of which the last was in December, 1892, and that the defendant knew it at the time he made the representations. The evidence would warrant a further finding that in continuous reliance upon such representations the plaintiff kept his stock, when he otherwise would have sold it, until the following July, when its market value depreciated and he thereby suffered loss. The defendant, protesting that he made no such representation and that the jury would not be justified in finding that he had, says that even upon such a finding the plaintiff would have no case. He contends that the representation was not material, that a false representation to be material must not only induce action but must be adequate to induce it by offering a motive sufficient to influence the conduct of a man of average intelligence and prudence, and that in this case the representation complained of, so far as it was false, was not adequate to induce action because the fictitious sales were so few and distant in time, and that therefore it was not material.

It may be assumed that the plaintiff desired to handle his stock in the manner most advantageous to himself, and that the question whether he would withdraw his order to sell was dependent, somewhat, at least, upon this view of the present or future market value of the stock; and upon that question a man of ordinary intelligence and prudence would

consider whether the reported sales in the market were "true sales throughout" or were fictitious, and what was the extent of each. It is true that a corporation may be of so long standing and of such a nature, and the number of shares so great and the daily sales of the stock in the open market so many and heavy, that the knowledge that a certain percentage of the sales reported are not actual business transactions would have no effect on the conduct of an ordinary man. On the other hand a corporation may be so small and of such a nature and have so slight a hold on the public, and the number of its shares may be so small and the buyers so few, that the question whether certain reported sales are fictitious may have a very important bearing upon the action of such a man. Upon the evidence in this case, we cannot say, as matter of law, that the representation so far as false was not material. This question is for the jury, who are to consider it in the light of the nature of the corporation and its standing in the market and of other matters, including such as those of which we have spoken.

It is further urged by the defendant that one of the fundamental principles in a suit like this is that the representations should have been acted upon by the complaining party and to his injury; that at most the plaintiff simply refrained from action, and that "refraining from action is not acting upon representation" within the meaning of the rule; and further that it is not shown that the damages, if any, suffered by the plaintiff are the direct result of the deceit.

Fraud is sometimes defined as the "deception practiced in order to induce another to part with property or to surrender some legal right," Cooley, Torts (2d ed.) 555, and sometimes as the deception which leads "a man into damage by wilfully or recklessly causing him to believe and act upon a falsehood." Pollock Torts, (Webb's ed.) 348, 349. The second definition seems to be more comprehensive than the first, (see for instance *Barley v. Walford*, 9 Q. B. 197, and *Butler v. Watkins*, 13 Wall. 456), and while the authorities establishing what is a cause of action for deceit are to a large extent convertible with those which define the right to rescind a contract for fraud or misrepresentation and the two classes of cases are generally cited without any express discrimination, still discrimination is sometimes needful in the comparison of the two classes of cases. Pollock, Torts, (Webb's ed.), 352.

It is true that it must appear that the fraud should have been acted upon. It is a little difficult to see precisely what is meant by the contention that "refraining from action is not acting upon representation." If by refraining from action it is meant simply that the person defrauded makes no change but goes on as he has been going and would go whether the fraud had been committed or not, then the proposition is doubtless true. Such a person has been in no way influenced, nor has his conduct been in any way changed by the fraud. He has not acted in reliance upon

it. If, however, it is meant to include the case where the person defrauded does not do what he had intended and started to do and would have done save for the fraud practiced upon him, the proposition cannot be true. So far as respects the owner of property, his change of conduct between keeping the property on the one hand and selling it on the other, is equally great, whether the first intended action be to keep or to sell; and if by reason of fraud practiced upon him the plaintiff was induced to recall his order to sell, and, being continuously under the influence of this fraud, kept his stock when, save for such fraud, he would have sold it, then with reference to this property he acted upon the representation within the meaning of the rule as applicable to cases like this. *Barley v. Walford*, 9 Q. B. 197. *Butler v. Watkins*, 13 Wall. 546.

The cases of *Lamb v. Stone*, 11 Pick. 527, *Wellington v. Small*, 3 Cush. 145, and *Bradley v. Fuller*, 118 Mass. 239, upon which the defendant relies, are not authorities for the proposition that "refraining from action is not acting upon representation."

As to whether the loss suffered by the plaintiff is legally attributable to the fraud, much can be said in favor of the defendant, and a verdict in his favor on this as well as on other material points might be the one most reasonably to be expected upon the evidence, especially when it is considered that during the years 1892 and 1893 the plaintiff was a director in the company; but we cannot decide the question as a matter of law. If the fraud operated on the plaintiff's mind continuously, up to the time of the depreciation of the stock in June, 1893, so that he kept his stock when otherwise he would have sold it, and such was the direct, natural and intended result, then we think the causal relation between the fraud and the loss is sufficiently made out. See *Reeve v. Dennett*, 145 Mass. 23, 29.

Exceptions sustained.

DAMAGE.

FREEMAN V. VENNER.

(120 Massachusetts, 424.—1876.)

TORT. Writ dated December 22, 1873. The declaration alleged that on July 16, 1873, James W. Cox and Judah H. Cox made a negotiable promissory note payable to the plaintiff or order in the sum of \$3500, in two years from date, secured by mortgage of land in New Hampshire; that on November 21, 1873, the plaintiff and the defendant entered into an agreement in writing, a copy of which was annexed, and

which was in substance that the defendant agreed to sell and the plaintiff to purchase a parcel of land in Boston, and in payment therefor to assign to the defendant a certain mortgage held by him on land in New Hampshire for the sum of \$3500, the deeds to be passed on December 1, 1873; that on that day the plaintiff assigned the mortgage mentioned to the defendant, "and by mistake and inadvertence on his part and through the false and fraudulent representations of the defendant he indorsed said note in blank," and that the defendant, upon request of the plaintiff, refused to allow him to qualify such indorsement, and against the objection of the plaintiff negotiated the same to Thomas P. Tenney, a *bona fide* holder for value, and also transferred said mortgage to him, and that he is held to pay the same. The answer contained a general denial, and alleged that the plaintiff at the commencement of the action had paid nothing and had sustained no damage by reason of such indorsement.

At the trial in the Superior Court, before PRYMAN, J., without a jury, it appeared that at the time of indorsing the note, December 1, 1873, the plaintiff also intentionally assigned to the defendant the mortgage given to secure said note, and by the same assignment, the note and the debt secured by the mortgage; that before commencing his action, or at any time before said trial, the plaintiff had made no payment on account or by reason of the indorsement; that, before the commencement of this action and before the maturity of the note, the makers thereof had become bankrupts; that since the commencement a semi-annual instalment of interest had become due; that Tenney had caused the real estate to be sold by virtue of the power contained in the mortgage, had applied a part of the proceeds of the sale in liquidation of that interest, and, since the maturity of the note, had applied the balance of the proceeds in part payment of the note, and had commenced an action against the plaintiff to recover the balance of said note (due demand having been made and notice given) which action is now pending.

"Upon this evidence, the judge found that from the agreement of the parties the defendant was not entitled to have the personal liability of the plaintiff as indorser of the note, and that the plaintiff through inadvertence and ignorance of the law and by the misdirection of the defendant, wrote his name so as to become an unqualified indorser of said note; that, as soon as the plaintiff became aware of the obligation he had assumed, and before the defendant had negotiated the note or altered his position in any way, the plaintiff demanded that the defendant should allow him to qualify his indorsement so that it should merely transfer the title according to the agreement, that the defendant refused, and thereupon the plaintiff forbade him to negotiate the note; but the defendant notwithstanding, and in defiance, immediately negotiated the note before maturity to a *bona fide* holder for value."

Upon the foregoing evidence and findings, the defendant requested the judge to rule that the plaintiff could not maintain his action, but, if he could, that he was entitled to recover only nominal damages. The judge declined so to rule, and held that, upon this evidence and these findings, the defendant was liable for the conversion of the note, and that the measure of the plaintiff's damages was the amount which the plaintiff was legally compellable to pay to the holder of the note, and interest, less the amount realized from the sale under the mortgage, treating the same as a partial payment, and gave judgment for the sum of \$2465.68. The defendant alleged exceptions.

COLT, J. It was found as matter of fact by the court in a trial without a jury, that the defendant was not, by the terms of the agreement, relied on by the plaintiff, and made part of the declaration, entitled to hold the plaintiff liable as indorser of the Cox note; and that the plaintiff indorsed the same through inadvertence, ignorance of the law and misdirection of the defendant. The agreement, however, provided for the assignment of the plaintiff's right and interest in the mortgage given to secure the note in question. The court ruled that upon the evidence the defendant was liable for the conversion of the note, and that the measure of damages was the amount which the plaintiff was legally liable to pay the holder of it; namely, the amount due on the same, less the amount realized from the mortgage; and judgment was rendered accordingly.

The difficulty with this ruling is, that upon the facts disclosed there was no conversion of the note. By the terms of the agreement, the defendant was entitled to an assignment of the mortgage debt. The indorsement of the plaintiff transferred the legal title in the note to the person to whom it legally belonged. The gist of the action is the fraud of the defendant in wrongfully obtaining the unrestricted indorsement of the plaintiff, and afterwards, against his objection, negotiating the note to a holder for value without notice. The plaintiff upon his own showing could not impeach the defendant's title to the note and mortgage, or his right to transfer that title to another. The ruling of damages for the conversion of a promissory note cannot be applied to such an action. *Mercer v. Jones*, 3 Camp. 477. 2 Green L. Ev. s. 649.

The further objection is, that treating this as an action to recover damages for an alleged fraud, the plaintiff shows no damages sustained at the time his action was commenced. It was then uncertain and contingent whether he would ever be called on to pay the note. It was payable to the plaintiff or order in two years, and was dated in July, 1873, shortly before its transfer by his indorsement to the defendant. The liability of the plaintiff depended on the failure of the makers to pay and the giving of due notice to him as indorser. No payment has in fact ever been made by him. If the holder received his pay from the makers

through the mortgage security or otherwise, the plaintiff will have suffered no actionable wrong. There will have been no concurrence of damage with fraud, within the rule on which such actions are founded. And as there has been no invasion of the plaintiff's right, no breach of promise, and no interference with his property, there can be no recovery of even nominal damages in this action. *Pasley v. Freeman*, 3 T. R. 51. 2 Smith Lead. Cas. (6th Am. ed.) 157, and notes.

Exceptions sustained.

RICE V. MANLEY.

(66 New York, 82.—1876.)

EARL, J. The plaintiffs had made an agreement with one Stebbins to purchase from him a large quantity of cheese, to be delivered at a future day, at Cattaraugus station, Cattaraugus County. There had been no compliance with the Statute of Frauds so as to make the agreement binding upon either party, but both parties would have performed it but for the fraud of the defendant. The defendant knowing of the agreement, for the fraudulent purpose of defeating its performance by Stebbins, of depriving the plaintiffs of the benefit thereof, and of himself obtaining the cheese, caused a telegraphic dispatch to be sent to Stebbins, signed by the name of E. Rice, which he meant Stebbins should understand to be the name of one of the plaintiffs, to the effect that he could sell the cheese and plaintiffs did not care for it. He took the dispatch from the telegraph office and carried it to Stebbins, and by this fraud induced Stebbins to sell and deliver the cheese to him before the day of delivery to the plaintiffs arrived. The referee held that defendant was liable to the plaintiffs for the damages sustained by them in consequence of this fraud; but the general Term reversed the judgment, holding, upon the authority of the case of *Dung v. Parker*, 52 N. Y. 494, that the plaintiffs could recover no damage, because the agreement for the sale of the cheese to the plaintiffs, by Stebbins, was void by the Statute of Frauds.

It was said by COKE, J. (in 3 Bulst. 95), that "fraud without damage, or damage without fraud, gives no cause of action; but when these two concur an action lies." This language has been frequently quoted with approval by judges and text writers, and the rule as thus laid down is generally applicable to the multifarious forms of fraud which come before the courts. Fraud and falsehood are *mala in se*, and wrongful in the eye of the law, so that if damage results therefrom there is the damage and wrong necessary to create a cause of action. Ad. on Law of Torts,

25. In 2 Hilliard on Torts, 75, the learned author lays down the rule as follows: "In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit and acquire it to himself;" and it must also be added that plaintiff was deceived and damaged.

What difference can it make that plaintiffs could not enforce their agreement against Stebbins? The referee found that Stebbins would have performed the agreement and that plaintiffs would have had the benefit of it but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged; that there was not both fraud and damage, so as to satisfy the rule above laid down? Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A a legacy, and was prevented from doing it solely by the fraud of B; in such case, while A has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B, depending upon the facts of the case. Kerr on Frauds, 274, and cases cited; Bacon Ab., FRAUD, B. Suppose A made a parol contract with B for the purchase of land, and B is ready and willing to convey, but is prevented from so doing by the fraudulent representations of C as to A, by which B is deceived and induced to convey to C; in such case, although A could not have compelled B to give him the conveyance, it would be a reproach to the law to hold that C would not be liable to A for the damage caused by the fraud.

The case of *Benton v. Pratt*, 2 Wend. 385, is quite in point, and is conceded by the learned judge who wrote the opinion of the General Term to be a controlling authority for the maintenance of this action if not overruled. In that case Seagraves & Wilson, of Allentown, Penn., had made a contract with the plaintiffs to purchase of him, to be delivered at a future day, twenty hogs, nothing having been done to make the contract binding within the Statute of Frauds. While the plaintiff was driving his hogs and thus preparing to perform his contract, the defendants, knowing the facts, drove their hogs to Allentown, and fraudulently represented that plaintiff did not intend to deliver his hogs to Seagraves & Wilson, and thus induced them to buy their hogs; and when plaintiff arrived with his hogs, Seagraves & Wilson refused to take them solely because they had a full supply. That was a case where the plaintiff could not have enforced his contract against Seagraves & Wilson, and yet the court held that he could maintain an action of fraud against the defendants for damages sustained on account of the fraud. Judge Sutherland said: "There is the assertion on the

part of the defendant of an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive, and material injury resulting therefrom to the plaintiff. This is sufficient to sustain the action." He also said: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding upon them or not; the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants."

In *Snow v. Judson*, 38 Barb. 210, it was held that false statements made by an individual in regard to articles manufactured by others, for the purpose of preventing sales by them of such articles, which do in fact present such sales and injure the manufacturers in their business, constituted a cause of action. It has been held in many cases that a false representation, made with intent to injure one, and in relying on which he is injured, is a good cause of action, although no benefit accrues to the party making it, from the falsehood. *Pasley v. Freeman*, 3 Term. R. 51; *White v. Merritt*, 7 N. Y. 352. In the latter case it is said that the action will lie whenever there has been the assertion of a falsehood with a premeditated design, as to a fact, when a direct and positive injury arises from such assertions; and *Benton v. Pratt* is cited as authority. In *Green v. Button*, 2 C. M. & R. 707, the plaintiff had made a contract for the purchase of spruce battens for £11; upon the case, as presented to the court, the battens had not been delivered or paid for. The defendant, who had loaned the plaintiff the money to pay for the battens, went to the sellers and falsely and fraudulently represented, among other things, that he had a lien on the battens, and ordered and directed them not to deliver them. The sellers, being deceived by the representations, were induced not to deliver the battens, and the plaintiff suffered damage; and it was held that an action for the fraud could be maintained, although the sellers were under no obligation to deliver the battens.

The mere forms adopted for the perpetration of frauds are of little importance; it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury, or whether it be direct or indirect in its consequences. Schemes of fraud may be so cunningly devised as to elude the eye of justice, but they must not escape condemnation and reparation when discovered.

The case of *Dung v. Parker* is not in conflict with these views, and it was not there intended to overrule the case of *Benton v. Pratt*. In that case the defendant falsely represented that he had authority to lease, as agent for another, certain premises, and as such agent he contracted by parol to lease the premises to the plaintiff for the term of two years; in consequence of which plaintiff incurred expense to pro-

cure fixtures to fit up the premises. It was held that the plaintiff could not recover. In that case the parol lease was void under the Statute of Frauds, and if the defendant had possessed full authority to lease the premises, or if the contract had been made directly with the owner of the premises, it would have been without legal force or validity; and it was upon this ground that plaintiff was defeated. The rule was laid down, "that an agent, who falsely represents his authority to make a contract on behalf of another, is not liable in contract or tort, unless the principal would have been bound by the contract made if the agent had such authority." There was no proof that plaintiff could have procured a valid lease. But if it had been shown that the owner had agreed to give the lease and was willing to do so, and was prevented by the fraud of the defendant, a case would have been presented like this, and a different result would have been reached.

* * * * *

The order of the General Term must be reversed, and judgment upon report of referee affirmed, with costs.

All concur.

Order reversed, and judgment accordingly.

SLANDER OF TITLE.¹

MALACHY V. SOPER.

(3 Bingham, N. C., 371.—1836.)

TINDAL, C. J. In this case a verdict having been found for the plaintiff at the trial of the cause, with £5 damages, a motion has been made to arrest the judgment on the ground that the declaration does not state any legal cause of action; and we are of opinion that this objection is well founded, and that the judgment must be arrested.

This is not an ordinary action for defamation of the person, by the publication of slander, either oral or written, in which form of action no special damage need either be alleged or proved, the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as shareowners in a certain mine, for an account and an injunction, had been granted by the Vice-Chancellor and that persons duly authorized had arrived in the workings. The publication, therefore, is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must show

¹ "The wrong called Slander of Title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by the defendant's falsehood to act in a manner causing damage to the plaintiff. Notwithstanding the current name, an action for this cause is not like an action for ordinary defamation; it is 'an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title.' Also the wrong is a 'malicious' one in the only proper sense of the word, that is, absence of good faith is an essential condition of liability; or bad faith as well as special damage is of the gist of the action. The special damage required to support this kind of action is actual damage, not necessarily damage proved with certainty in every particular. Such damage as is the natural consequence of the false statement may be special enough though the connexion may be not specifically proved." Pollock on Torts, 7th Ed., 301.

a special damage to have happened from the publication, and that this declaration shows none.

The first question, therefore, is, Does the law require in such an action an allegation of special damage? And, looking at the authorities, we think they all point the same way. The law is clearly laid down in Sir W. Jones, 196 (*Lowe v. Harewood*). "Of slander of title, the plaintiff shall not maintain action unless it was *re vera* a damage *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz., *Sir John Tasburgh v. Day*, Cro. Jac. 484, and *Manning v. Avery*, 3 Keb. 153, the case of *Cane v. Golding*, Style's Rep. 169, 176, furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., "His right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiose*, and that he was likely to sell and was injured by the words; and that by reason of speaking the words he could not recover his titles. After verdict for the plaintiff there was a motion in arrest of judgment; and ROLLE, C. J., said, "There ought to be a scandal and a particular damage set forth, and there is not here;" and upon its being moved again and argued by the judges, ROLLE, C. J., held, that the action did not lie, although it was alleged that the words were spoken *falso et malitiose*, for "the plaintiff ought to have a special cause; but that the verdict might supply; but the plaintiff ought also to have showed a special damage, which he hath not done, and this the verdict cannot supply. The declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;" and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, Has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases, is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (Cro. Eliz. 197, Cro. Car. 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale. R. 1, Rolle, 244. Admitting, however, that these may be put as instances

only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, "that the plaintiff is injured in his rights, and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done." And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.

It has been argued in support of the present action that it is not so much an action for slander of title, as an action for a libel on the plaintiff in the course of business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in chancery, out of which the publication arose, is filed by Tollervey, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended, affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is

conveyed, that is, whether it be through words or writing or print; but that it rests on the nature of the action itself, namely, it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and in consequence more likely to be serious than where the slander of title is by words only, but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion that the action is not maintainable, and that the judgment must be arrested; and consequently it becomes unnecessary to inquire whether the *innuendo* laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the judgment,

Absolute.

HATCHARD V. MÈGE.

(L. R. 18 Queen's Bench Division, 771.—1887.)

THE statement of claim alleged that the defendants wrote and published "of and concerning the plaintiff and his said trade as a wine-merchant and importer the following false and malicious libel, that is to say:—

"'Caution: Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be the wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised,' thereby meaning that the plaintiff had no right to use his said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavoring to pass off an inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word 'Delmonico' as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom."

DAY, J. This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered,

The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The *innuendo* charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine-merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in Odgers on Libel and Slander, c. v., p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria*. The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff."

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage

I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shown injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim.

*Order for a new trial.*¹

KENDALL v. STONE.

(5 New York, 14.—1851.)

GARDINER, J. The cause of action in this case is denominated "slander of title" by a figure of speech, in which the title to land is personified, and made subject to many of the rules applicable to personal slander, when the words in themselves are not actionable. To maintain the action, the words must not only be false, but they must be uttered maliciously, (*Smith v. Spooner*, 3 Taunt. 254; *Pater v. Baker*, 3 Man. G. & S. 868.) and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged in the declaration, and substantially proved on the trial. (*Beach v. Ranney*, 2 Hill, 314; *Crain v. Petrie*, 6 Hill, 524.)

The declaration in this case alleges, in the only count to which the evidence applies, that by means of the grievances divers good citizens, and especially one Asa H. Wheeler, were deterred from purchasing the lands in question, and the plaintiff was prevented from disposing of the same, and thereby deprived of the advantages to be derived from the sale thereof, etc. The loss of a sale to Wheeler is therefore the only

¹ Opinion by Wills, J., omitted.

special damage incurred by the plaintiff alleged in the declaration and established by the evidence. The superior court places the recovery upon this ground, and it is obviously the only one on which it can be sustained.

Before the words were spoken the plaintiff and Wheeler had entered into an agreement in writing for the sale of the lot in question, which was executed by the vendor, and accepted by the vendee, who upon its delivery paid \$250 towards the purchase money. The agreement was obligatory upon both parties. Either could have enforced a specific performance in equity, and thereby attained the precise result contemplated by the contract. Under these circumstances, the representations charged were made by the defendant. The effect of them was not to prevent a sale of the land, for that had been secured by the existing contract. Wheeler was induced by the misrepresentation to desire a relinquishment of the agreement. This was assented to by the plaintiff, the agreement was rescinded, and the note of the vendor received for the amount of the money advanced by the purchaser. This suit was then instituted, and special damages claimed of the defendant, substantially for the non fulfillment of a contract which had been surrendered by the consent and agreement of the plaintiff. This is a brief statement of the proceeding.

The court charged "that it was pretty manifest, from the testimony of Wheeler, that the plaintiff had sustained damages; that the former would have taken the title, if it had not been for the words spoken by the defendant." To this there was an exception, and the question is whether the special damage alleged by the plaintiff, which is the gist of the action, was established by this evidence.

* * * * *

There is no case that holds that, where the special damage consists in the violation of a contract, the plaintiff may discharge the obligation, and then recover damages in an action of tort for its non-performance. The right claimed to be affected by the slander originated in and subsisted by virtue of the contract. When that was discharged, it fell with it. The vendor and vendee elected to consider the agreement as null from the beginning. When the suit was instituted, therefore, there could be no injury, for there was no right to be affected. Yet, under these circumstances, the plaintiff has been permitted to recover a thousand dollars by way of damages, because Wheeler wished to be discharged from a purchase of a lot, the stipulated value of which was \$900, and was discharged by the vendee accordingly.

In *Bird v. Randall*, 3 Burrows, 1345, the action was for enticing a servant from the employment of the plaintiff. The servant was bound to the master for five years, under a penalty of £100. The plaintiff sued the servant, and recovered judgment, which was paid after the suit

against the defendant was at issue and noticed for trial. It was held that the defendant was discharged. The recovery against the servant by him, and payment, put an end to the contract, as Lord Mansfield remarks, and in his reasoning he puts a satisfaction upon the same ground as a release or discharge of the contract. The judgment must be reversed.

Judgment reversed, and new trial ordered.

DANGEROUS THINGS AND ANIMALS ¹

THINGS.

RYLANDS V. FLETCHER.

(L. R. 3 English & Irish Appeals, 330.—1868.)

THIS was a proceeding in error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, Fletcher brought an action against Rylands & Horrocks, to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants had constructed. The declaration contained three counts, and each count alleged negligence on the part of the defendants, but in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the defendants in the exercise of them.

The material facts of the case were these:—The plaintiff was the lessee of certain coal mines known as the Red House Colliery, under the Earl of Wilton. He had also obtained from two persons, Mr. Hulton and Mr. Whitehead, leave to work for coal under their lands. The posi-

¹ "We have now to consider the cases where a stricter duty has been imposed. As a matter of history, such cases cannot easily be referred to any definite principle. But the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause, in the particular event of the danger having ripened into actual harm. The law might have been content with applying the general standard of reasonable care, in the sense that a reasonable man dealing with a dangerous thing—fire, flood-water, poison, deadly weapons, weights projecting or suspended over a thoroughfare, or whatever else it be—will exercise a keener foresight and use more anxious precaution than if it were an object unlikely to cause harm, such as a faggot, or a loaf of bread. . . . But the course adopted in England has been to preclude questions of detail by making the duty absolute; or, if we prefer to put it in that form, to consolidate the judgment of fact into an unbending rule of law. The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such risk is held, although his act is not of itself wrongful, to insure his neighbor against any consequent harm not due to some cause beyond human foresight and control." Pollock on Torts, 7th ed., 475.

tions of the various properties were these:—There was a turnpike road leading from Bury to Bolton, which formed a southern boundary to the properties of these different persons. A parish road, called the old Wood Lane, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. Whitehead on the east and Lord WILTON on the west. The defendants' grounds lay along the turnpike road, or southern boundary stretching from its centre westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House Colliery also lay, in part, along the southern boundary, stretching from its centre eastward. Immediately north of the defendants' land lay the land of Mr. Hulton, and still farther north that of Lord WILTON. On this land of Lord WILTON the defendants, in 1860, constructed (with his Lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord WILTON and the land of Mr. Hulton, and so reach the defendants' mill. The line of direction from this new reservoir to the Red Colliery mine was nearly southeast.

The plaintiff, under his lease from Lord WILTON, and under his agreements with Messrs. Hulton and Whitehead, worked the mines under their respective lands. In the course of doing so, he came upon old shafts and passages of mines formerly worked, but of which the workings had long ceased; the origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal, and the former especially seemed filled with marl and rubbish. Defendants employed for the purpose of constructing their new reservoir persons who were admitted to be competent as engineers and contractors to perform the work, and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir, five old shafts, running vertically downwards, were met with in that portion of the land selected for its site. The case found that "on the part of the defendants there was no personal negligence or default whatever in or about, or in relation to the selection of the said site, or in or about the planning or construction of the said reservoir; but, in point of fact, reasonable and proper care and skill were not exercised by, or on the part of, the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860 and on the morning of the 11th of that month the reservoir, being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downwards, in consequence of which the water of the reservoir flowed into the old passages and coal-workings underneath, and by

means of the underground communications then existing between them and the plaintiff's workings in the Red House Colliery, the colliery was flooded and the workings thereof stopped.

The question for the opinion of the court was whether the plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron BRAMWELL dissenting, gave judgment for the defendants. (3 H. & C. 774.) That judgment was afterwards reversed in the Court of Exchequer Chamber. (4 id. 263; L. R. 1 Ex. 265.) The case was then brought on error to this House.

THE LORD CHANCELLOR (LORD CAIRNS). My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact, some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the workings by the plaintiff of his mine, he gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred, was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith v. Kenrick*, 7 C. B. 515, in the Court of Common Pleas.

On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, the case of *Baird v. Williamson*, 15 C. B. (N. S.) 317, which was also cited in the argument at the bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles, referred to by Mr. Justice BLACKBURN in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH. My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice BLACKBURN in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether

his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, Sir T. Raym. 421. And the doctrine is founded on good sense. For when one person, in managing his own affair, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith v. Kenrick* and *Baird v. Williamson*. In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that case, was only left by the defendant to flow in its natural course.

But in the later case of *Baird v. Williamson* the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally arising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case)

had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith v. Kenrick*, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.

MEARS v. DOLE.

(135 Massachusetts, 508.—1883.)

COLBURN, J. This is a bill in equity. As appeared from the bill, answer and master's report, the plaintiff and the defendant both own lands bounded northwesterly by the sea in Quincy Bay, in Boston Harbor; the lands of the defendant being bounded easterly and northeasterly and in part northwesterly on land of the plaintiff (a part of the plaintiff's land extending between the defendant's land and the sea). The shore on both the plaintiff's and the defendant's lands, being composed of gravel and shingle, had become compacted and indurated, so that so far back as can be ascertained, at least for nearly two hundred years, there had been no substantial change in the shore line. The defendant excavated and carried away for sale the soil and gravel from his land, down to low-water mark, from the sea for a considerable distance inland, and near to the lines of the plaintiff's land, but not so near that, except for the action of the sea, his lands would have been undermined and fallen in.

It is a matter of common knowledge, that the rise of the tide in Boston Harbor is ten or twelve feet. The consequence of this excavation has been, through the action of the sea, that the plaintiff's lands have been

undermined and have fallen, and have been washed into the excavation of the defendant, the soil in places has been washed away by being overflowed by the sea at high tides, and the gravel and shingle have been washed from the base of a hill along the shore, at some distance from the excavation of the defendant, so that the soil of said hill is caving, and is being carried away by the action of rains, frosts and melting snows down to the shore, and the plaintiff's well has been rendered at times brackish.

The defendant contends that to take away the soil, gravel, and other material from his land, is a natural and reasonable use of his land; and that to deprive him of that use would render his land comparatively worthless.

Without discussing at length the question of the natural and non-natural uses of land, which has been considered in some cases, we are of opinion that a person has no right to carry away the gravel or other material of his land, if the consequence would be to turn a watercourse, or to let in the sea, so as to inundate or injure the land of his neighbor. As said by Chief Justice SHAW in *Commonwealth v. Alger*, 7 Cush. 53, 86; "All real estate, inland or on the sea-shore, derived immediately or remotely from the government of the State, is taken and held under the tacit understanding that the owner shall so deal with it as not to cause injury to others; that when land is so situated or such is its conformation, that it forms a natural barrier to rivers or tidal watercourses, the owner cannot justifiably remove it, to such an extent as to permit the waters to desert their natural channels, and overflow, and perhaps inundate fields and villages, render rivers, ports and harbors shallow, and consequently desolate, and thereby destroy the valuable rights of other proprietors, both in the navigation of the stream, and in the contiguous lands." "Ordinarily, and when no such circumstances exist, the owner of land has a perfect right to use and remove the earth, gravel and clay of which the soil is composed, as his own interest or convenience may require. But can he do this when the same materials form the natural embankment of a watercourse? He may say, perhaps, that he merely intends to make use of materials which are his own, and to which he has a right, and for which he has other uses. But we think the law will admit of no such excuse; he knows that, when these materials are removed, the water, by the law of gravitation, will rush out, and all the mischievous consequences of diverting the watercourse will follow." See *Attorney General v. Tomline*, 40 L. T. (N. S.) 775.

The defendant by his excavations, for his own purposes, brought the sea upon his land, where it would not have been but for the excavations, and as a consequence it has escaped, and acted upon the plaintiff's land so as to cause damage, and for this he must be held responsible. *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279; L. R. 3 H. L. 330. 339; *Smith*

v. *Fletcher*, L. R. 7 Ex. 305; *Wilson v. New Bedford*, 108 Mass. 261. It is true that the injury was caused by the natural action of the sea; but this action was exerted at a place where it would not have occurred except for the acts of the defendant. The fact that the water was not accumulated and kept on the defendant's land is immaterial; it was by his acts caused to come there, twice a day, probably causing more damage than if it had been dammed up there.

It is well settled to be an actionable tort to allow filthy water to percolate from a vault through the soil, to the injury of a well or cellar of a neighboring proprietor. *Ball v. Nye*, 99 Mass. 582. Though sea-water may not be filthy water, it is as effectually destructive to a well for domestic purposes as is such water. A person is liable for the injuries caused by the percolation through the earth of water, artificially introduced or accumulated upon his land, to the cellar, well or vegetation of a neighboring proprietor. *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 46; *Wilson v. New Bedford*, *ubi supra*; *Pixley v. Clark*, 35 N. Y. 520.

It is urged by the defendant, that the sea is regarded as a common enemy, and that it is a rule that each man may defend himself against its encroachments as best he can, even if thereby it washes against his neighbor's land. This may be so, but the rule has no application to the case at bar. The defendant was not protecting himself against the common enemy; he voluntarily introduced the enemy upon his land, and allowed it to escape from there to the injury of the plaintiff.

The defendant contends that no action can be maintained against him at the suit of an individual, but that the remedy is by indictment. Whatever rights the Commonwealth may have in tide-water or the sea-shore, it has never attempted, so far as we are aware, by any legislative acts, to do more than protect navigation, by preserving the integrity of the harbor; and if the defendant is liable to indictment, the plaintiff is not thereby deprived of his right of action. His damages are special and peculiar, and are not sustained in common with the public, or, so far as appears, with any other individual. *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Brayton v. Fall River*, 113 Mass. 218.

We are of opinion that for such injuries to his land as the plaintiff showed were the direct result of the excavations made by the defendant, in changing the action of the sea, he is entitled to recover.

We do not understand from the master's report that he assessed any damages for injury to the driftway. The driftway was upon a natural dike, which protected the plaintiff's land from the sea; and it was for injuries caused by cutting away this natural dike, as part of the defendant's excavation, that damages were assessed, and not for the loss of the driftway, as a way, as we construe the report.

It appears that, on September 25, 1876, the plaintiff brought an action at law against the defendant, in which he recovered damages for injuries

resulting from digging and carrying away gravel. The defendant contends that damages must in that case have been assessed for the injuries then received, and such as would in the future result from the excavation made at the time that action was brought; and that, as the master has assessed damages for all injuries which have resulted since September 25, 1876, he must have included some damages which were embraced in the assessment in the former suit. This objection of the defendant, that he has been subjected to double damages, may be well founded. The master had no facts before him from which he could determine whether or not any part of the damages he assessed were recovered in the former suit. He states in his report that he had "not been shown how great an excavation had been made by the defendant on September 25, 1876, or how much that excavation had been increased since that date." It was the duty of the plaintiff, in claiming incidental damages in this suit, to show what such damages were. They were such damages as he had sustained from the defendant's unlawful acts, for which he could not have recovered in the former suit. And to show for what he could, or could not, have recovered in the former suit, it was necessary for him to show as far as possible the extent of the excavation on September 25, 1876, and the progress or changes, if any, made in the excavation between that date and the time damages were assessed in that suit. If the defendant had ceased to excavate on September 25, 1876, and did not resume until after the assessment of damages in the former suit, the plaintiff was entitled to recover in that suit such damages as he had sustained at the time of the assessment, and such as would probably result in the future from that excavation, or such expense as he might be obliged to incur to prevent future damages, as these damages would all be the result of the cause for which the suit was brought. But if, after September 25, 1876, and before the assessment of damages in the first suit, the defendant had enlarged and changed his excavation, so as to cause damages to the plaintiff, in amount or kind, which would not have resulted from the excavation as it existed when the action was brought, so that a new cause of action accrued to the plaintiff, in which the original cause was merged, he could only recover such damages in the first action as had resulted while that cause of action continued. *Warner v. Bacon*, 8 Gray, 397; *Troy v. Cheshire Railroad*, 3 Foster, 83, 101.

As the master had no evidence before him upon which he could determine these questions, there must be a reassessment of damages; and, upon being furnished with the proper evidence, the master will be able to determine, with as much accuracy as the nature of the case admits, what damages were recoverable in the former suit, and what are incident to the suit at bar.

It appears that the master allowed, as part of the damages assessed,

the expense of erecting structures to prevent further damage, which the master finds must result after October 9, 1880, if the defendant then ceased to excavate, unless such structures were erected. We do not understand that he assessed the expense of any structures to repair past damages, or assessed damages for any injuries which might result in the future from excavations made up to October 9, 1880, except so far as assessing the expense of structures to prevent future damages may be considered as practically an assessment of future damages. It does not appear what these structures were to be, or when or where they were to be erected, or their estimated cost. We can understand that structures might in some cases be erected, which would prevent future injury, at much less cost than would compensate for the injuries if not prevented. If the defendant had been restrained by injunction from making any further excavation, or had permanently desisted from all further excavation, the plaintiff would be entitled to recover for such future injuries as would probably result from the excavation already made; and if the plaintiff could prevent such injuries by erecting structures at a less cost than the injuries would amount to, the defendant could not complain that he was required to pay the cost of such structures, rather than damages for the injuries. This principle of assessing the costs of structures to prevent future damages is recognized in *Bates v. Ray*, 102 Mass. 458, and in *Fowle v. New Haven and Northampton Co.*, 112 Mass. 334. This case does not depend upon the same principles, as to damages, as the case cited by the defendant, relating to damages for injuries resulting from the loss of lateral support of land. In this case, the plaintiff was not directly deprived of the support to his land of the land of the defendant. The defendant introduced a destructive element upon his land, which he suffered to escape to the injury of the plaintiff's land, and to continue its devastations indefinitely.

As the case must be recommitted to the master to revise his assessment of damages, and as the defendant has now been enjoined from future digging, in order to settle the whole controversy between the parties, and give the plaintiff all the damages to which he is entitled as incident to the relief he seeks, the case should be recommitted to the master to assess all the damages sustained by the plaintiff from the excavations of the defendant which he could not have recovered in the former action, and for such future injuries as are probable to result, if any, and, if the cost of structures to prevent future injuries is assessed, to report the nature and estimated cost of such structures, and the estimated future damages they are expected to prevent.

This case has been treated by counsel and the master, and in the decree, as if the question of incidental damages was open under the bill, but the only prayer of the bill is for an injunction. The bill may be

amended by adding a prayer for the assessment of incidental damages. The decree entered in this case, dated June 27, 1881, and filed August 2, 1881, is to stand, as entered, except as to the damages and costs ordered to be paid, and the case recommitted to the master for the assessment of damages as above indicated.

BROWN v. COLLINS.

(53 New Hampshire, 442.—1873.)

TRESPASS, by Albert H. Brown against Lester Collins, to recover the value of a stone post on which was a street lamp, situated in front of his place of business in the village of Tilton. The post stood upon the plaintiff's land, but near the southerly line of the main highway leading through the village and within four feet of said line. There was nothing to indicate the line of the highway, nor any fence or other obstruction between the highway, as travelled, and the post. The highway crosses the railroad near the place of accident, and the stone post stood about fifty feet from the railroad track at the crossing. The defendant was in the highway, at or near the railroad crossing, with a pair of horses loaded with grain, going to the grist-mill in Tilton village. The horses became frightened by an engine on the railroad near the crossing, and by reason thereof became unmanageable, and ran, striking the post with the end of the pole and breaking it off near the ground, destroying the lamp with the post. No other injury was done by the accident. The shock produced by the collision with the post threw the defendant from his seat in the wagon, and he struck on the ground between the horses, but suffered no injury except a slight concussion. The defendant was in the use of ordinary care and skill in managing his team, until they became frightened as aforesaid.

DOE, J. It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated that the defendant was without actual fault,—that he was not guilty of any malice, or unreasonable unskillfulness or negligence; but it is to be inferred that the fact was so; and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent, and desire of the defendant.

Sir Thomas Raymond's report of *Lambert & Olliot v. Bessey*, T. Raym. 421, and *Bessey v. Olliot & Lambert*, T. Raym. 467, is, "The question

was this: A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, Whether the gaoler be liable to an action of false imprisonment? and the judges of the common pleas did all hold that he was; and of that opinion I am for these reasons.

"1. In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore Mich. 6 E. 4. 7. a. pl. 18. *Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbor's house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up, hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea*.

"Mich. 23, Car. 1. B. R.—Stile 72. *Guilbert versus Stone*. Trespass for entering his close, and taking away his horse. The defendant pleads, that he, for fear of his life, by threats of twelve men, went into the plaintiff's house, and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

"Hob. 134, *Weaver versus Ward*. Trespass of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant, with his musket, *casualiter & per infortunium & contra voluntatem suam* in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained. . . . But the three other judges resolved, that the defendant, the gaoler, could not be charged, because he could not have notice whether the prisoner was legally arrested or not."

In *Fletcher v. Rylands*, L. R. 3 H. L. 330, Lord CRANWORTH said:

"In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

The head-note of *Weaver v. Ward*, Hob. 134, is: "If one trained soldier wound another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear from the defendant's plea that he was guilty of no negligence, and that the injury was inevitable." The reason of the decision, as reported, was this: "For though it were agreed, that if men tilt or tourney in the presence of the king, or if two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*, yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

There may be some ground to argue that "utterly without his fault," "inevitable," and "no negligence," in the sense intended in that case, mean no more than the modern phrase "ordinary and reasonable care and prudence;" and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all "the circumstance" or evidence sustaining the plea would be substantially in compliance with the law of that case, due allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often held liable "because," as Raymond says, "he that is damaged ought to be recompensed;" and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party

suffering," more than the negligence and blameworthiness of the defendant: but how much more it regarded the former than the latter, was a question not settled, and very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him; when and why the "loss and damage" should, and when and why they should not, be transferred from one to the other, by process of law, were problems not solved in a philosophical manner. There were precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject.

Mr. Holmes says: "It may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort (than actual fault), and in modern times to more or less definitely thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, anything savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a cause of action as an intentional one. On the other hand, when, as in *Rylands v. Fletcher*, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle, sufficient to charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." He alludes to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at a certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly assumed ground of decision. 7 Am. Law Rev. 652, 653, 662; 2 Kent Com. (12th ed.) 561, n. 1; 4 *id.* 110, n. 1. If the hazardous nature of things or of acts is adopted as the test, or one of the tests, and the English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from anything done upon his own land" (Mellish's argument in *Fletcher v. Rylands*, L. R. 1 Ex. 272), and that an individual is answerable "who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor"—GIBBS, C. J., in *Sutton v. Clarke*, 6 Taunt. 44, approved by BLACKBURN, J., in *Fletcher v. Rylands* L. R. 1 Ex. 286. If danger is

adopted as a test, and the English authorities are abandoned, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort into a question of reasonableness, in a form much broader than has been generally used; or courts will be left to devise tests of peril, under varying influences of time and place that may not immediately produce a uniform, consistent, and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether, by transferring the hardship to the other party, anything more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief. For some of those decisions, better reasons may now be given than were thought of when the decisions were announced: but whether a satisfactory test of an actionable tort can be extracted from the ancient authorities, and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in *Fletcher v. Rylands* (3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330; L. R. (Phil. ed.) 3 Ex. 352) can be sustained, is very doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view is by BLACKBURN, J., who says, in *Fletcher v. Rylands*, L. R. 1 Ex. 279, 280, 281, 282: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above, stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.

But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench. The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law, as to them, seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape,—that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore [or he might have added, dogs to bite],—but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. . . . In these latter authorities [relating to animals called mischievous or ferocious], the point under consideration was damage to the person; and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage, is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. . . . There does not appear to be any difference in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing, which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor.”

This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the defendant. The ancient rule was, that a person in whose house, or on whose land, a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss. *Filliter v. Phippard*, 11 A. & E. (N. S.) 347, 354; *Tubervil v. Stamp*, 1 Comyns, 32; s. c., 1 Salk. 13; Com. Dig., *Action upon the case for Negligence* (A 6.); 1 Arch. N. P. 539; *Fletcher v. Rylands*, 3 H. & C. 790, 793; *Russell v. Fabyan*, 34 N. H. 218, 225. No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied, by BLACKBURN,

to everything which a man brings on his land, which will, if it escape, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule, as laid down in the English cases, is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises, and does him damage without proof of negligence." *Losee v. Buchanan*, 51 N. Y. 476, 487.

Everything that a man can bring on his land is capable of escaping,—against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art,—and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things; it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seem to be man's duty carefully to do. The distinction made by Lord CAIRNS, *Rylands v. Fletcher*, L. R. 3 H. L. 330, between a natural and a non-natural use of land, if he meant anything more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. "Most of the rights of property, as well as of person, in the social state, are not absolute but

relative," *Losee v. Buchanan*, 51 N. Y. 485; and, if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In *Fletcher v. Rylands*, L. R. 1 Ex. 286, 287, Mr. Justice BLACKBURN, commenting upon the remark of Mr. Baron MARTIN, "that, when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible," says,—“This is no doubt true; and, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger, *Hammack v. White*, 11 C. B. N. s. 588, 31 L. J. (C. P.) 129; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, *Scott v. London Docks Company*, 3 H. & C. 596, 35 L. J. (Ex.) 17, 220; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what, *prima facie*, was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself.” This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident carrying a traveller off the street. But such a doctrine would open more questions, and more difficult ones, than it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being in-

habited, as to assume a highway risk by living near a road? If a neighborhood is the test, who are a man's neighbors but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country because he could avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage done by brutes or by fire, found in the early English cases, were introduced by sacerdotal influence, from what was supposed to be the Roman or the Hebrew law. 7 Am. L. Rev. 652, *note*; 1 Domat Civil Law (Strahan's translation, 2d ed.) 304, 305, 306, 312, 313; Exodus xxi: 28-32, 36; xxii: 5, 6, 9. It would not be singular if these rules should be spontaneously produced at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade, and productive enterprise,—when the common law had not been set forth in the precedents, as a coherent and logical system on many subjects other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them, as they were extended in *Rylands v. Fletcher*, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be contrary to American authority as well as to our understanding of legal principles.

The difficulty under which the plaintiff might labor in proving the culpability of the defendant,—which is sometimes given as a reason for imposing an absolute liability without evidence of negligence,—*Rixford v. Smith*, 52 N. H. 355, 359, or changing the burden of proof, *Lisbon v. Lyman*, 49 N. H. 553, 568, 569, 574, 575, seems not to have been given in the English cases relating to damage done by brutes or fire. And, however large or small the class of cases in which such a difficulty may be the foundation of a rule of law, since the difficulty has been so much reduced by the abolition of witness disabilities, the present case is not one of that class.

There are many cases where a man is held liable for taking, converting (*C. R. Co. v. Foster*, 51 N. H. 490) or destroying property or doing some-

thing else, or causing it to be done, intentionally, under a claim of right, and without any actual fault. "Probably one half of the cases in which trespass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights." METCALF, J., in *Stanley v. Gaylord*, 1 Cush. 536, 551. When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted, and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act; or by an act of which he knew, or ought to have known, the damage would be a necessary, probable, or natural consequence; or by an act which he knew or ought to have known, to be unlawful,—we understand the general rule to be, that he is not liable. *Vincent v. Stinehour*, 7 Vt. 62; *Aaron v. State*, 31 Ga. 167; *Morris v. Platt*, 32 Conn. 75; and Judge REDFIELD's note to that case in 4 Am. L. Reg. (N. S.) 532; Townshend on Slander, secs. 67, 88, p. 128, n. 1 (2d ed.). In *Brown v. Kendall*, 6 Cush. 292, the defendant, having interfered to part his dog and the plaintiff's which were fighting, in raising a stick for that purpose accidentally struck the plaintiff, and injured him. It was held, that parting the dogs was a lawful and proper act which the defendant might do by the use of proper and safe means; and that if the plaintiff's injury was caused by such an act done with due care and all proper precautions, the defendant was not liable. In the decision, there is the important suggestion that some of the apparent confusion in the authorities has arisen from discussions of the question whether a party's remedy is in trespass or case, and from the statement that when the injury comes from a direct act, trespass lies, and when the damage is consequential, case is the proper form of action,—the remark concerning the immediate effect of an act being made with reference to damage for which it is admitted there is a remedy of some kind, and on the question of the proper remedy, not on the general question of liability. Judge SHAW, delivering the opinion of the court, said: "We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev., secs. 85 to 92; *Wakeman v. Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*, 2 Chit. R. 639; Com. Dig. *Battery*, A. (Day's ed.) and notes; *Vincent v. Stinehour*, 7 Vt. 62;" *James v. Campbell*, 5 C. & P. 372; *Alderson v. Waistell*, 1 C. & K. 358.

Whatever may be the rule or the exception, or the reason of it, in cases of insanity, *Weaver v. Ward*, Hob. 134; Com. Dig. *Battery*, A. note d, Hammond's ed.; *Dormay v. Borradaile*, 5 M. G. & S. 380; Sedgwick on Damages, 455, 456, 2d ed.; *Morse v. Crawford*, 17 Vt. 499; *Dickinson v. Barber*, 9 Mass. 225; *Krom v. Schoonmaker*, 3 Barb. 647; *Horner v. Marshall*, 5 Munf. 466; *Yeates v. Reeds*, 4 Blackf. 463, and whatever may be the full legal definitions of necessity, inevitable danger, and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through the plaintiff's window. Upon the facts stated, taken in the sense in which we understand them, the defendant is entitled to judgment. 1 Hilliard on Torts, ch. 3, 3d ed.; *Losee v. Buchanan*, 51 N. Y. 476; *Parrot v. Wells*, 15 Wall. 524, 537; *Roche v. M. G. L. Co.*, 5 Wis. 55; *Eastman v. Co.*, 44 N. H. 143, 156.

Case discharged.

LOSEE V. BUCHANAN.

(51 New York, 476.—1873.)

APPEAL from an order of the General Term of the Supreme Court, reversing a judgment entered upon a verdict in favor of the defendants, in an action to recover damages occasioned by the explosion of a boiler owned and used by the Saratoga Paper Company. Buchanan and Bullard were joined with the company as defendants, on the ground that they were trustees, stockholders and agents, and engaged in superintending the business of the company. The Clutes, who manufactured the boiler, were also made defendants, on the ground that they had built the boiler in a negligent manner.

EARL, C. Upon the first trial of this action, the presiding judge dismissed the complaint as against the defendants Clute, who manufactured the engine, and held that the other defendants were liable irrespective of negligence, and excluded all evidence to show that they were not guilty of negligence. For this error, upon appeal to the General Term, the judgment was reversed and new trial granted, the court holding that the defendants could be made liable only by proof against them of negligence. Upon the second trial, the presiding judge held in accordance with the law as thus laid down by the General Term, and upon

the question of negligence the jury decided against the Saratoga Paper Company and in favor of the other two defendants. The plaintiff claimed, as he did upon the first trial, that the defendants were liable without the proof of any negligence, and requested the justice so to rule, and the refusal of the justice to comply with this request raises the principal question for our consideration upon this appeal.

Upon the last appeal, the majority of the court held the law to be as it had been held upon the first appeal, but a new trial was granted for certain alleged errors in the charge of the justice, which will hereafter be considered.

The claim on the part of the plaintiff is, that the casting of the boiler upon his premises by the explosion was a direct trespass upon his right to the undisturbed possession and occupation of his premises, and that the defendants are liable just as they would have been for any other wrongful entry and trespass upon his premises.

I do not believe this claim to be well founded, and I will briefly examine the authorities upon which mainly an attempt is made to sustain it.

In *Farrand v. Marshall*, 21 Barb. 409, it was held that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. This is upon the principle that every man has the natural right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. He has a right to the support of the adjoining soil, and to that extent has an easement in his neighbor's soil, and when the soil is removed his easement is directly interfered with. When one adjoining owner thus removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil. This rule, however, as stated by Judge BRONSON in *Radcliff's Executors v. Mayor, etc., of Brooklyn*, 4 Comst. 203, must undoubtedly be somewhat modified in its application to cities and villages. In *Hay v. The Cohoes Company*, 2 Comst. 159, the defendant, a corporation dug a canal upon its own land for the purposes authorized by its charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land. This is far from an authority for holding that the defendants, who placed a

steam boiler upon their lands, and operated the same with care and skill, should be liable for the damages caused by the explosion, without their fault or any direct or immediate act of theirs. It is true that Judge GARDNER, in writing the opinion of the court, lays down broadly the principle that "every individual is entitled to the undisturbed possession and lawful enjoyment of his own property," citing the maxim *sic utere tuo*, etc. But this principle, as well as the maxim, as will be seen, has many exceptions and limitations, made necessary by the exigencies of business and society.

In *Bellinger v. The New York C. R. R. Co.*, 23 N. Y. 47, it was decided that where one interferes with the current of a running stream, and causes damage to those who are entitled to have the water flow in its natural channel, but such interference is in pursuance of legislative authority granted for the purpose of constructing a work of public utility, upon making compensation, he is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. Judge DENIO, in his opinion, referring to the maxim *aqua currit et debet currere*, says, it "absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretence, and subjects him to damages, at the suit of any party injured without regard to any question of negligence or want of care." The liability in such cases is based upon the principle that the interference is an immediate and direct violation of the right of the other riparian owners to have the water flow in its natural channel. No one has an absolute property in the water of a running stream. He may use, it, but he must not, by his use of it, interfere with the equal right which other riparian owners have also to use it, and have it flow in its natural channel.

In *Pixley v. Clark*, 35 N. Y. 520, it was held, that if one raises the water in a natural stream above its natural banks, and to prevent its outflow constructs embankments which answer the purpose perfectly, but by the pressure of the water upon the natural banks of the stream percolation takes place so as to drain the adjoining lands of another, an action will lie for the damages occasioned thereby; and that it matters not whether the damage is occasioned by the overflow of or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. This decision was an application of the maxim *aqua currit et debet currere* to the facts of that case. It was held that the liability was the same whether the water was dammed up and caused to overflow or to percolate through the banks of the stream. It was a case of flooding lands by damming up the water of a stream, and the liability of a wrongdoer in such a case has never been disputed.

In the case of *Selden v. The Delaware and Hudson Canal Co.*, 24 Barb. 362, it was held that the defendant had the power, under its charter, to enlarge its canal; but that, though it possessed this power, and upon making compensation therefor to take private property for that purpose, it was liable to remunerate individuals in damages for any injuries they might sustain as the consequence of such improvement; and that, if by means of the enlargement, a lawful act in itself, the lands of an individual were inundated, even though the work may have been performed with all reasonable care and skill, it was a legal injury, for which the owner was entitled to redress. It may well be doubted if this decision can stand in view of the principles laid down in the case of *Bellinger v. The New York Central Railroad Company*, *supra*. Within the principles of that case, if the Delaware and Hudson Canal Company exercised a power conferred upon it by law in a lawful and proper manner, it could not be held liable for the consequential damages necessarily occasioned to the owners of adjoining lands. But if we assume, as was assumed at the General Term in that case, that the defendant did not have the protection of the law for the damages which it occasioned, then it was clearly liable. Its acts were necessarily and directly injurious to the plaintiff. It kept the water in its canal when it knew that the necessary consequence was to flood the plaintiff's premises. The damage to plaintiff was not accidental, but continuous, direct and necessary. In such a case the wrongdoer must be held to have intended the consequence of his acts, and must be treated like one keeping upon his premises a nuisance doing constant damage to his neighbor's property.

In the case of *McKeon v. See*, 4 Rob. Superior Court R. 449, it was held, that the defendant had no right to operate a steam engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. This case was decided upon the law of nuisances. It was held that the engine and machinery, in the mode in which they were operated, were a nuisance, and the decision has been affirmed at this term of this court. The decision in this case, and in scores of similar cases to be found in the books, is far from an authority that one should be held liable for the accidental explosion of a steam boiler which was in no sense a nuisance. We are also cited to a class of cases holding the owners of animals responsible for injuries done by them. There is supposed to be a difference as to responsibility between animals *mansuetæ naturæ* and *feræ naturæ*. As to the former, in which there can be an absolute right of property, the owner is bound at common law to take care that they do not stray upon the lands of another, and he is liable for any trespass they may commit, and it is altogether immaterial whether their escape is purely accidental or due to negligence. As to

the latter, which are of a fierce nature, the owner is bound to take care of them and keep them under control, so that they can do no injury. But the liability in each case is upon the same principle. The former have a known, natural disposition to stray, and hence the owner knowing this disposition is supposed to be in fault if he do not restrain them and keep them under control. As to the former, the owner is not responsible for such injuries as they are not accustomed to do, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity. As to all animals, the owner can usually restrain and keep them under control, and if he will keep them he must do so. If he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon the fault which the law attributes to him, and no further actual negligence need be proved than the fact that they are at large unrestrained. But if I am mistaken as to the true basis of liability in such cases, the body of laws in reference to live animals, which is supposed to be just and wise, considering the nature of the animals and the mutual rights and interests of the owners and others, does not furnish analogies absolutely controlling in reference to inanimate property.

Blackstone (vol. 3, p. 209) says, "that whenever an act is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie;" for "the right of *meum* and *tuum* or property in lands being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry, therefore, thereon without the owner's leave, and especially, contrary to his express order, is a trespass or transgression." The learned author was here laying down the distinction between an action of trespass and trespass on the case, and asserting the rule that in the former action the injury must be direct and immediate, and accompanied with some force, whereas in the latter action it could be indirect and consequential. He was also manifestly speaking of a direct entrance by one upon the lands of another. He was laying down a general rule that every unauthorized entrance upon the land of another is a trespass. This was sufficiently accurate for the enunciation of a general rule. Judges and legal writers do not always find it convenient, practicable or important, in laying down general rules, to specify all the limitations and exceptions to such rules. The rule, as thus announced, has many exceptions, even when one makes a personal entry upon the lands of another. I may enter my neighbor's close to succor his beast whose life is in danger; to prevent his beasts from being stolen or to prevent his grain from being consumed or spoiled by cattle; or carry away my tree which has been

blown down upon his land, or to pick up my apples which have fallen from my trees upon his land, or to take my personal property which another has wrongfully taken and placed there, or to escape from one who threatens my life. Bacon's *Abridgement*, Trespass, F. Other illustrations will be given hereafter.

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.

I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the defendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

But our attention is called to a recent English case, decided in the Exchequer Chamber, which seems to uphold the claim made. In the case of *Fletcher v. Rylands*, 1 Exchequer, 265, Law Reports, the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines, under the site of the reservoir and under part of the intervening land, had been formerly worked; and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication be-

tween his colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts and flowed, by the underground communication, into the plaintiff's mines. It was held, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused, upon the broad doctrine that one who, for his own purposes, brings upon his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. Mr. Justice BLACKBURN, writing the opinion of the court, says: "The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escapes out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more;" and he reaches the conclusion that it is an absolute duty, and that the liability for damage from the escape attaches without any proof of negligence. This conclusion is reached by the learned Judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property. That case was appealed to the House of Lords and affirmed, 3 H. L. [Law Rep. 330], and was followed in *Smith v. Fletcher*, 20 W. R. 987.

It is sufficient, however, to say that the law, as laid down in those cases, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. Angell on Water-courses, § 336; *Tapham v. Curtis*, 5 Vt. 371; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic, etc., Co.*, 23 id. 225; *Shrewsbury v. Smith*, 12 Cushing, 177; *Livingston v. Adams*, 8 Cowen, 175;

Bailey v. Mayor, etc. of New York, 3 Hill. 531, s. c. 2 Denio, 433; *Pixley v. Clark*, 35 N. Y. 520, 524; *Sheldon v. Sherman*, 42 id. 484.

The true rule is laid down in the case of *Livingston v. Adams* as follows: "Where one builds a mill-dam upon a proper model and the work is well and substantially done, he is not liable to an action though it break away in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable."

In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence. *Clark v. Foot*, 8 J. R. 422; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 id. 424; *Lansing v. Stone*, 37 id. 15; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 11 Metcalf, 406; *Batchelder v. Heagan*, 18 Maine, 32. The rule, as laid down in *Clark v. Foot*, is as follows: "If A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A. unless there was some negligence or misconduct in him or his servant." And this is the rule throughout this country except where it has been modified by statute. *Tourtellot v. Rosebrook* was an action to recover damages caused by a fire communicated to the plaintiff's land from a coal-pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant.

In *Hinds v. Barton*, 25 N. Y. 544, and *Teall v. Barton*, 40 Barb. 137, sparks were emitted from a steam dredge used upon the Erie canal, and they set fire to neighboring buildings, and although the sparks were thrown directly upon the buildings it was held that the defendants could be made liable only by proof of negligence. In *Cook v. The Champlain Transportation Co.*, 1 Denio, 91, the buildings of the plaintiff were fired by sparks thrown thereon from defendants' steamboat upon Lake Champlain, and it was held that the defendant could be made liable only by proof of negligence. All these cases and the class of cases to which they belong are in conflict with the rule as claimed by the plaintiff. A man may build a fire in his house or his steam-boiler, and he does not become liable without proof of negligence if sparks accidentally pass directly from his chimney or smoke-stack to the buildings of his neighbor. The maxim of *sic utere tuo*, etc., only requires in such a case the exercise of adequate skill and care.

The same rule applies to injuries to the person. No one in such case is made liable without some fault or negligence on his part, however

serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person. It is settled in numerous cases that if one driving along a highway accidentally injures another he is not liable without proof of negligence. *Center v. Finney*, 17 Barb. 94; *Hammock v. White*, 103 Eng. Com. Law, 587.

In *Harvey v. Dunlop*, Lalor's Supplement, 193, the action was for throwing a stone at the plaintiff's daughter and putting out her eye. It did not appear that the injury was inflicted by design or carelessness, but did appear that it was accidental, and the court held that the plaintiff could not recover, laying down the broad rule that no liability results from the commission of an act arising from inevitable accident, or which ordinary human care and foresight could not guard against. In *Dyert v. Bradley*, 8 Wend. 469, the action was for running one boat against another in the Erie canal, and the court held that if the injury was occasioned by unavoidable accident, no action would lie for it; but if any blame was imputable to the defendant, he would be liable. In *Brown v. Kendall*, 6 Cushing, 292, the defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose, accidentally struck the plaintiff and severely injured him; it was held that he was not liable. In writing the opinion of the court, Chief Justice SHAW says: "It is frequently stated by judges that where one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither willful, intentional or careless." We think, as the result of all the authorities, that the rule is that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault*; for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be held liable. If, in the prevention of a lawful act, a casualty, purely accidental, arises, no action can be supported for an injury arising therefrom. So too, contrary to what was held in an early English case, if one raise a stick in self-defense to defend himself against an assault and accidentally hit a third person, he cannot, in my opinion, be made liable for the injury thus, without fault or negligence, inflicted.

In *Rockwood v. Nelson*, 11 Cushing, 221, Mr. Justice THOMAS says: "Nothing can be better settled than that if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence."

In *Bissell v. Booker*, 16 Ark. 308, it was held that one who is hunting in the wilderness is not bound to anticipate the presence, within range of his shot, of another man, and that he is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware. (See, also, the case of *Driscoll v. The Newark and Rosendale Co.*, 3 N. Y. 637.)

In *Spencer v. Campbell*, 9 Watts & S. 32, a man drove a horse to defendant's steam grist-mill to get some grist which he had had ground, and he was thus lawfully upon defendant's premises and was just as much entitled to protection there as if he had been upon his own premises. While there the steam boiler exploded and killed his horse, and the action was brought for the value of the horse; and it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill and diligence. I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam boiler was absolutely liable, irrespective of any care, skill or diligence on his part, for any damage which the boiler by its explosion occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident.

In support of the plaintiff's claim in this action the rule has been invoked that, where one of two innocent parties must suffer, he who puts in motion the cause of the injury must bear the loss. But, as will be seen by the numerous cases above cited, it has no application whatever to a case like this.

This examination has gone far enough to show that the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part.

In this case the defendants had the right to place the steam boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence. The judgment in their favor should, therefore, have been affirmed at the General Term, unless there were errors in the charge, or refusal to charge, of the judge who presided at the trial, and these alleged errors I will now briefly examine.

It is alleged that the judge erred in charging the jury that "defendants are not liable for negligence or want of skill on the part of the manufacturers of the boiler in question not known to them;" "that defend-

ants are not liable except upon proof of negligence or unskilfulness on the part of the authorized servants or agents of the company;" "that there is no proof of any relation between the plaintiff and defendant, Buchanan, creating any obligation or duty on the part of the latter toward the former;" "that defendant, Buchanan, is not liable for any negligence or unskilfulness on the part of the Saratoga Company, or on the part of the manufacturers of the boiler in question." These are not found in the charge, but were decisions made upon the motion for a nonsuit, and were not excepted to.

The judge charged the jury "that if they were of opinion that the reduction by Goddard (the engineer and agent of the paper company, who had charge of the boiler) of the steam pressure from 120 to 110 was a proper, prudent and sufficient exercise of care and skill under the circumstances, that the defendants were not liable on account of leakage;" "that the cold shut in the head that previously gave out was no evidence of the cold shut in the head that did give out;" "that if Goddard told Bullard that it would be prudent to run the steam boiler at 110, and if Bullard believed that and acted upon it, then he was not liable;" "that if the jury found from the evidence that Goddard came to the conclusion that to reduce the pressure from 120 to 110 would render the use of the boiler prudent and safe, and communicated that idea to Bullard, he, Bullard, was not personally liable." These charges were excepted to by plaintiff's counsel. These were requests to charge on the part of the defendants acceded to by the judge. Some of them should properly have been somewhat qualified and explained, and are therefore liable to some criticism. But we must look at the whole charge, and judge of it from its whole scope, and if, taking it altogether, it presented the questions of law fairly to the jury so as not to mislead them, exceptions to separate propositions in it, or to detached portions of it, will not be upheld. As said by Chief Judge CHURCH, in *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, "If the charge as a whole conveyed to the jury the correct rule of law, on a given question, the judgment will not be reversed although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, misled."

The judge in his charge submitted the whole question of negligence to the jury. He charged that the defendants were liable for the omission of such care as men of ordinary prudence engaged in the use of such a steam boiler in such business would exercise, and that they were liable for any imperfections in the boiler, which contributed to the explosion, which were known to them; but that if the explosion was caused by the cold shut in the head of the boiler which was imperceptible to the defend-

ants or undiscoverable on examination or by the application of known tests, they were not liable. He charged the jury fully in reference to the leakage of the boiler, and his charge upon that subject was fully as favorable to the plaintiff as he could claim. He called the attention of the jury to all the facts connected with it and to what Goddard had told Bullard, about it, and stated to them that they had a right to say, from all the facts, whether or not Bullard was chargeable with negligence in the use of the boiler, under the circumstances. I think, from the charge as made, the jury could not have failed to understand that the defendants were to be held liable for any defects in the manufacture of the boiler which they knew or ought to have known, and for any negligence in the use of the boiler which could be attributed to them.

The plaintiff requested the court to charge "that the defendants cannot excuse or justify themselves in the use of the boiler in question, on the ground that the same was purchased of reputable manufacturers." This the judge refused to charge, and the plaintiff excepted. The principle of law involved in this request was fairly covered by the charge as made, and yet it may well be doubted whether the judge would have been justified in charging in the language of the request. The fact that the defendants bought the boiler of reputable manufacturers was one of the facts tending to a justification which the jury were to consider. It was not of itself a conclusive justification, and the judge did not charge that it was. If he had refused to charge that they could not justify on the *sole* ground that they had purchased it of reputable manufacturers, it would have been error. A charge in the very language of the request might have misled the jury by taking from their consideration the fact that the boiler was bought from reputable manufacturers upon whose judgment, skill and integrity the defendants had the right to place some reliance.

I have, therefore, reached the conclusion that no error was committed upon the trial of this action, and it follows that the order of the General Term must be reversed, and the judgment entered upon the verdict must be affirmed, with costs.

All concur.

Order reversed and judgment accordingly.

ANIMALS.

MAY V. BURDETT.

(9 Queen's Bench, 101.—1846.)

CASE. The declaration stated that defendant, "before and at the time of the damage and injury hereinafter mentioned to the said Sophia, the wife of the said Stephen May, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2d of September, 1844, did attack, bite, wound, lacerate, and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit, from the day and year last aforesaid, to the time of the commencement of this suit whereby, and in consequence of the alarm and fright occasioned by the said monkey, so attacking, biting, wounding, lacerating, and injuring her as aforesaid, the said Sophia has been greatly injured in her health," &c.

Plea, not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the sittings in Middlesex, after Hilary Term, 1845, a verdict was found for the plaintiff with £50 damages. Cockburn, in the ensuing term, obtained a rule to show cause why judgment should not be arrested.

Cur. adv. vult.

LORD DENMAN, CH. J. This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c.

It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept

with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be, that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with *Thomas v. Morgan*, 2 Cro. M. & R. 496, s. c. 5 Tyr. 1085, and all in the same form, or nearly so. In the Register, 110, 111, two precedent of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason v. Keeling*, 12 Mod. 332, s. c. 1 Ld. Raym. 606, much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various *dicta* in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In Comyns's Digest, tit. Action upon the Case for Negligence (A 5), it is said that "an action upon the case lies for a neglect in not taking care of his cattle, dog," &c., and passages were cited from the older authorities, and from some cases at *nisi prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually were done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be

this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed without express averment. The precedents, as well as the authorities, fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith v. Pleah*, 2 Stra. 1264, and a passage in 1 Hale's Pleas of the Crown, 430, put the liability on the true ground. It may be that, if the injury was solely occasioned by the willfulness of the plaintiff after warning, that may be a ground of defense by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.

It was said indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred while the defendant kept it. We are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged.

Rule discharged.

FILBURN V. PEOPLES PALACE & AQUARIUM CO.

(L. R. 25 Queen's Bench Division, 258.—1890.)

THE action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; and whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.

LORD ESHER, M. R. The only difficulty I feel in the decision of this

case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are *feræ naturæ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions,—that is, unless it is shown to be either harmless by its nature, or to belong to a class that has become so by what may be called cultivation,—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

LINDLEY, L. J. I am of the same opinion. The last case of this kind discussed was *May v. Burdett*, 9 Q. B. 101, but there the monkey which did the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide this case. We have had no case cited to us, nor any evidence, to show that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not

know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The broad principle that governs this case is that laid down in *Fletcher v. Rylands*, Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330, that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of Lord HOLT and of HALE until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

DECKER V. GAMMON.

(44 Maine, 322.—1857.)

THIS is an action on the case, to recover the value of a horse, alleged to have been injured by the defendant's horse, and comes forward on exceptions to the rulings of GOODENOW, J.

The plaintiff introduced evidence tending to prove that at night, on the 13th of September, 1855, he put his horse into his field well and uninjured. The next morning, September 14th, his horse and the defendant's were together in his, the plaintiff's close, the defendant's horse having, during the night, escaped from the defendant's enclosure, or from the highway, into the close of the plaintiff, and that the plaintiff's

horse was severely injured by the defendant's horse, by kicking, biting, or striking with his fore feet, or in some other way, so that he died in a few days after.

The defendant requested the presiding judge to instruct the jury that to entitle the plaintiff to recover against the defendant he must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the alleged injury.

The presiding judge declined giving these instructions, and directed the jury, that, if they should find that the defendant owned the horse alleged to have done the injury to the plaintiff's horse, and if, at the time of the injury, he had escaped into the plaintiff's close, and was wrongfully there, and while there occasioned the injury, and that the horse died in consequence, that the plaintiff would be entitled to recover the value of the horse so injured. That it was not necessary for the plaintiff to prove that the horse was vicious, or accustomed to acts of violence towards other animals or horses, or that the owner had notice of such viciousness or habits.

The jury returned a verdict for the plaintiff.

DAVIS, J. There are three classes of cases in which the owners of animals are liable for injuries done by them to the persons or the property of others. And in suits for such injuries the allegations and proofs must be varied in each case, as the facts bring it within one or another of these classes.

1. The owner of wild beasts, or beasts that are in their nature vicious, is, *under all circumstances*, liable for injuries done by them. It is not necessary, in actions for injuries by such beasts, to allege or prove that the owner knew them to be mischievous, for he is conclusively presumed to have such knowledge; or that he was guilty of negligence in permitting them to be at large, for he is bound to keep them in at his peril.

"Though the owner have no particular notice that he did any such thing before, yet if he be a beast that is *feræ naturæ*, if he get loose and do harm to any person, the owner is liable to an action for the damage." 1 Hale, P. C., 430.

"If they are such as are naturally mischievous in their kind, in which the owner has no valuable property, he shall answer for hurt done by them, without any notice; but if they are of a tame nature, there must be notice of the ill quality." HOLT, C. J. *Mason v. Keeling*, 12 Mod. R. 332.

"The owner of beasts that are *feræ naturæ* must always keep them up, at his peril; and an action lies without notice of the quality of the beasts." *Rex v. Huggins*, 2 Lord Raym., 1583.

2. If domestic animals, such as oxen and horses, injure any one,

in person or property, *if they are rightfully in the place where they do the mischief*, the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief. And in suits for such injuries, such knowledge must be alleged, and proved. For unless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge he is liable.

"The gist of the action is the keeping of the animal after knowledge of its vicious propensities." *May v. Burdett*, 58 Eng. C. L., 101.

"If the owner have knowledge of the quality of his beast, and it doth anybody hurt, he is chargeable in an action for it." 1 Hale P. C., 430.

"An action lies not unless the owner knows of this quality." *Buxendin v. Sharp*, 2 Salk. 662.

"If the owner puts a horse or an ox to grass in his field, and the horse or ox breaks the hedge, and runs into the highway, and gores or kicks some passenger, an action will not lie against the owner unless he had notice that they had done such a thing before." *Mason v. Keeling*, 12 Modern R. 332.

"If damage be done by any domestic animal, kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief." *Vrooman v. Lawyer*, 13 Johns. R. 339.

3. The owner of domestic animals, *if they are wrongfully in the place where they do any mischief*, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind the ground of the action is, that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner, that they had previously been vicious.

"If a bull break into an enclosure of a neighbor, and there gore a horse so that he die, his owner is liable in an action of trespass *quare clausum fregit*, in which the value of the horse would be the just measure of damages." *Dolph v. Ferris*, 7 Watts & Searg. R. 367.

"If the owner of a horse suffers it to go at large in the streets of a populous city, he is answerable in an action on the case, for a personal injury done by it to an individual, without proof that he knew that the horse was vicious. The owner had no right to turn the horse loose in the streets." *Goodman v. Gay*, 3 Harris R. 188. In this case the writ contained the allegation of knowledge on the part of the defendant; but the court held that it was not material, and need not be proved.

The case before us is clearly within this class of cases last described. It is alleged in the writ that "the plaintiff had a valuable horse which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where of right he ought not to be; and being so unlaw-

fully at large, broke into the plaintiff's close, and injured the plaintiff's horse, &c." It is also alleged that "the vicious habits of the horse were well known to the defendant;" but this allegation was not necessary, and may well be treated as surplusage. If the defendant had had a right to turn his horse upon the plaintiff's close, it would have been otherwise. But if the horse was wrongfully there, the defendant was liable for any injury done by him, though he had no knowledge that the horse was vicious. The gravamen of the charge was, that the horse was wrongfully upon the plaintiff's close; and this was what was put in issue by the plea of not guilty.

Nor are these principles in conflict with the decision in the case of *Van Lenven v. Lyke*, 1 Comstock, 515. In that case the action was not sustained, because the declaration was not for trespass *quare clausum*, with the other injuries alleged by way of aggravation. But in that case there was no allegation that the animal was wrongfully upon the plaintiff's close; or that the injury was committed upon the plaintiff's close. 4 Denio R. 127. And in the Court of Appeals it was expressly held, that "if the plaintiff had stated in his declaration that the swine broke and entered his close, and there committed the injury complained of, and sustained his declaration by evidence, he would have been entitled to recover all the damages thus sustained." 1 Coms. 515, 518.

In the case before us, though the declaration is not technically for trespass *quare clausum*, it is distinctly alleged that the defendant's horse, "being so unlawfully at large, broke and entered the plaintiff's close, and injured the plaintiff's horse," which was there peaceably and of right depasturing. This was sufficient; and the instruction given to the jury, "that if the defendant's horse, at the time of the injury, had escaped into the close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be entitled to recover," was correct. And this being so, the instruction requested, "that the plaintiff must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the injury," was properly refused.

Exceptions overruled.

CUTTING, J., did not concur.

EVANS V. McDERMOTT.

(49 New Jersey Law, 163.—1886.)

PARKER, J. An action was brought in the Hoboken District Court, by John McDermott against Samuel Evans, the prosecutor, to recover damages occasioned by the bite of a dog.

It was proved that McDermott, at the time he was bitten, was, in the saloon kept by the prosecutor as a place of public resort; that the prosecutor was the owner and possessor of the dog; that in going from the billiard-room to the bar-room of the saloon, McDermott met the dog in the passage-way; that he put out his hand to motion the dog out of the passage-way he was obstructing, when the dog growled and bit him on the hand.

McDermott swore that about a month after he was bitten, his hand broke out from the effect of the bite; that he became nervous, lost sleep and suffered pain; that he employed a physician, paid for medicines, lost two or three weeks' wages, and was out of pocket in money about \$25.

Dr. Pinder, a practicing physician, swore that about the time McDermott's hand broke out, he was consulted professionally; that he made an examination of the hand and prescribed for the injury. He said that he found the skin broken, the hand considerably inflamed and swollen, and that it appeared to him to be a pretty bad hand. The witness added that hydrophobia might possibly result from such a wound, but that he did not apprehend such result in this case.

At the close of the plaintiff's evidence, the counsel for the defendant moved to nonsuit, on the ground that it did not appear that the dog had bitten McDermott maliciously; and also on the ground that there was no proof that the dog had bitten other persons, except in play; or that the defendant had knowledge of the propensity of the dog to bite.

The judge refused to nonsuit. In charging the jury, the judge said: "Some time ago, a girl was bitten by a dog in this state; the case was carried to the Supreme Court, and a judge there held the owner of the dog liable for an injury committed by the dog, if he had notice of his *mischievous propensity*; and this is the law which applies to this case."

Upon request to charge, the judge held, in substance, as he had ruled on the motion to nonsuit.

The jury found for McDermott in the sum of \$300 damages.

When the plaintiff rested, there was evidence of the propensity of the dog to bite, and that the defendant knew of it, before McDermott was bitten.

But it is said, on the part of the prosecutor, that although several persons had been bitten by the dog, of which he had information, yet it appeared that in every instance the biting occurred while the dog was in a playful mood; and it is argued that damages cannot be recovered where it is shown that the dog had a propensity to bite only in play; but that to justify a recovery, it must appear that the dog was in the habit of biting mankind while in an angry mood, actuated by a ferocious spirit.

This is not the law. An action can be maintained against the owner by a party injured, upon evidence that a dog, with the knowledge of the owner, had a *mischievous propensity* to bite mankind, whether in anger or not. In either case, the person bitten would suffer injury. A mischievous propensity is a propensity from which injury is the natural result.

In the case of *Hudson v. Roberts*, 6 Exch. 699, it appears that the plaintiff was walking in the street, wearing a red handkerchief. The bull of defendant, ordinarily gentle and quiet, and not known to have gored any person previously, was being driven along the street, when he attacked and gored the plaintiff. The defendant said that the red handkerchief caused it, and that he knew the bull would run at anything red. The plaintiff recovered. The bull had no hostile feeling against the man he injured, and no disposition to gore mankind, yet because of his mischievous propensity to rush at a red object, of which his owner knew, it was held that when he caused the injury to the plaintiff, through that propensity, his owner should pay damages.

A domesticated bear may hug a man until his ribs be broken. This may be the mode adopted by the animal to manifest his affection; yet if he had on other occasions previously, shown his affection in that way, causing injury, and his owner knew of such propensity, the owner would have to pay damages caused by breaking the man's ribs. It is true that the bear is classed with animals *feræ naturæ*, and the presumption in such case would be that although domesticated, the animal had relapsed into his wild habits; yet, although the presumption on the question of *scienter* would be against the owner, he might be able to prove that the habit of embracing persons did not proceed from the savage nature of the bear, but under the influence of civilization from a cultivated affection.

But this proof would not avail the owner in a suit by a party embraced. Such a propensity would be held to be mischievous, because hurtful to those who were the object of the bear's affection.

In the case of *Oaks v. Spaulding*, 40 Vt. 347, it appeared that Mrs. Oaks was driving cows home from pasture, when the ram of Spaulding attacked and injured her. It was shown that the ram had a propensity to butt mankind and that the defendant knew it, but it did not appear

whether the previous buttings by the ram proceeded from an ugly disposition, or from the exuberance of a playful spirit; yet it was held that the defendant was liable. It did not cure the hurt nor assuage the pain of the woman to be told that the ram, when he butted her, was only in one of his accustomed sportive moods. It might have been fun for the ram, but it was hurtful to Mrs. Oakes. It was a mischievous propensity, whether proceeding from ugliness of temper or from good nature, which, if known to the owner of the ram, made him liable for damages resulting from such propensity.

There is no doubt that in cases of animals not naturally inclined to do mischief, a previous mischievous propensity must be shown, and the *scienter* clearly established. The gist of the action is, not the keeping of the animal, but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not.

The conclusion is that the plaintiff below, having shown by his proof that on several previous occasions the dog in question had bitten various persons on the hand, with the knowledge of the defendant, he was entitled to recover, even if the habit did not proceed from a ferocious nature but was the result of a mischievous propensity.

In this instance (whatever may have been the circumstances attending the previous bitings of the dog,) the bite was accompanied by a growl, while McDermott was in a place where he had a right to be, and when he was doing nothing except to motion the animal out of the passage-way, which he was obstructing.

The damages found by the jury are not excessive. In such a case they cannot be measured by mere expenditure of money to cure from the effects of the bite. Compensation should be made for the pain and the anxiety of mind which must necessarily follow the bite of a dog.

*The judgment of the District Court is affirmed.*¹

BOSTOCK-FERARI AMUSEMENT CO. v. BROCKSMITH.

(34 Indiana Appellate Court, 566.—1904.)

DEFENDANT appeals from a judgment entered upon the verdict of a jury in favor of the plaintiff Brocksmith.

COMSTOCK, C. J. The complaint alleges that the plaintiff, while driving in his buggy, was injured in consequence of his horse taking fright from the sight of a bear walking along a public street in the

¹ To the same effect see *Klenberg v. Russell*, 125 Ind. 531; *Marble v. Ross*, 124 Mass. 44; *Muller v. McKesson*, 73 N. Y. 195.

city of Vincennes. The action was begun in the Circuit Court of Knox County, and, upon change of venue, tried in the Circuit Court of Sullivan County. The court rendered judgment upon the verdict of the jury in favor of appellee for \$750. The complaint was in three paragraphs. The first was dismissed, and the cause was tried upon the amended second and third paragraphs, to which general denial was filed.

The errors relied upon are the action of the court in overruling demurrers to said second and third paragraphs, respectively, of the complaint, and overruling appellant's motion for a new trial. Some of the reasons set out in the motion for a new trial are that the verdict was contrary to the law, and was not sustained by sufficient evidence.

The question of the sufficiency of the second paragraph of the complaint is not entirely free from doubt, but we conclude that each of said paragraphs is sufficient to withstand a demurrer.

It is sought to maintain an action for damages resulting from the fright of a horse at the sight of a bear, which his keeper and owner was leading along a public street, for the purpose of transporting him from a railroad train, by which he had been carried to Vincennes, to the point in Vincennes at which the bear was to be an exhibit as a part of appellant's show. It is not claimed, either by allegation or proof, that the show was in itself unlawful; and there is no pretence that the transporting of the bear from one place to another for the purpose of exhibition was unlawful, or in itself negligence. The case is therefore one of the fright of a horse merely at the appearance of the bear while he was being led along the street, was making no noise or other demonstration, and was in the control of his keeper. It appears without contradiction from the evidence that when the horse took fright the bear was doing nothing except going with his keeper. He was muzzled. He had a ring in his nose to which a chain was attached. Said chain was strong enough to hold and control him. He had around his neck a collar about two inches wide and one-half inch thick, to which also was attached a chain. The keeper had both chains in his hand when the accident occurred. The chain connected with the ring in his nose was small. The one connected with his collar was large. It was for the purpose of chaining him at night when he was alone. The chains were strong enough to control the bear. The animal was characterized by the witnesses who knew him as "gentle," "kind," "docile." His keeper testified that he had never known him to be mean or to growl. He testified also that he never knew of a bear scaring a horse; that shortly before the accident the keeper met two ladies in a buggy, and their horse did not scare. He was described as of pretty good size and brown. One witness said he was a "large, ugly-looking, brown bear."

When a person is injured by an attack by an animal *feræ naturæ*, the negligence of the owner is presumed, because the dangerous pro-

propensity of such an animal is known, and the law recognizes that safety lies only in keeping it secure. 2 Am. and Eng. Ency. Law (2d ed.), p. 351. In the case before us the injury did not result from any vicious propensity of the bear. He did nothing but walk in the charge of his owner and keeper, Peter Degeleih. He was being moved quietly upon a public thoroughfare for a lawful purpose.

We have given the facts that are not controverted. There is also evidence leading strongly to support the claim made by appellant that appellee was guilty of negligence, proximately contributing to his injury. Appellant also earnestly argues—supporting its argument with references to recognized authorities—that the owner and keeper of the bear was an independent contractor. But the disposition which we think should be made of the appeal makes it unnecessary to consider these questions. The liability of the appellant must rest on the doctrine of negligence. The gist of the action as claimed by appellee is the transportation of the bear, with knowledge that he was likely to frighten horses, without taking precaution to guard against fright.

1. An animal *feræ naturæ*, reduced to captivity, is the property of its captor, 2 Blackstone's Comm., * 391. * 403; 4 Blackstone's Comm., * 235, * 236.

2. The owner of the bear had the right to transport him from one place to another for a lawful purpose, and it was not negligence *per se* for the owner or keeper to lead him along a public street for such purpose. *Scribner v. Kelley*, (1862) 38 Barb. 14; *Macomber v. Nichols*, (1876) 34 Mich. 212; *Ingham*, Law of Animals, p. 230.

3. The conducting of shows for the exhibition of wild or strange animals is a lawful business. The mere fact that the appearance of a chattel, whether an animal or an inanimate object, is calculated to frighten a horse of ordinary gentleness, does not deprive the owner of such chattel of his lawful right to transport his property along a public highway. *Macomber v. Nichols*, *supra*; *Holland v. Bartch*, (1889) 120 Ind. 46; *Wabash, etc., R. Co. v. Farver*, (1887) 111 Ind. 195; *Gilbert v. Flint, etc., R. Co.*, (1883) 51 Mich. 488; *Piolette v. Simers*, (1894) 106 Pa. St. 95. One must use his own so as not unnecessarily to injure another, but the measure of care to be employed in respect to animals and other property is the same. It is such care as an ordinarily prudent person would employ under similar circumstances. This is not inconsistent with the proposition that if an animal *feræ naturæ* attacks and injures a person, the negligence of the owner or keeper is presumed. The evidence is that the horse was of ordinary gentleness, but this fact would not deprive the appellant of the right to make proper use of the street. If the bear had been carelessly managed, or permitted to make any unnecessary noise or demonstration, it would have been an act of negligence.

It is not uncommon for horses of ordinary gentleness to become frightened at unaccustomed sights on the public highway. The automobile, the bicycle, the traction-engine, the steam roller may each be frightful to some horses, but still they may be lawfully used on the public streets. King David said; "An horse is a vain thing for safety." Modern observation has fully justified the statement. A large dog, a great bull, a baby wagon may each frighten some horses, but their owners are not barred from using them upon the streets on that account. Nor under the decisions would the courts be warranted in holding that the owner of a bear, subjugated, gentle, docile, chained, would not, under the facts shown in the case at the bar, be permitted to conduct the homely brute along the public streets because of his previous condition of freedom.

In *Scribner v. Kelley, supra*, the court said: "It does not appear that the elephant was at large, but on the contrary that he was in the care, and apparently under the control, of a man who was riding beside him on a horse; and the occurrence happened before the passage of the act of April 2, 1862, regulating the use of public highways. There is nothing in the evidence to show that the plaintiff's horse was terrified because the object he saw was an elephant, but only that he was frightened because he suddenly saw moving upon a highway, crossing that upon which he was travelling, and fully one hundred feet from him, a large animate object to which he was unaccustomed—*non constat* that any other, moving object of equal size and differing in appearance from such as he was accustomed to see might not have inspired him with similar terror. The injury which resulted from his fright is more fairly attributed to a lack of ordinary courage and discipline in himself, than to the fact that the object which he saw was an elephant."

4. It is alleged in the complaint that the bear was an object likely to frighten a horse of ordinary gentleness, which fact the appellant well knew. There is no evidence that the bear was an object likely to frighten horses of ordinary gentleness, nor that the appellant knew that bear was an object likely to frighten horses of ordinary gentleness. The evidence shows, so far as the observation of the keeper and the appellant gave information, that the bear had not frightened horses.

* * * * *

The facts upon the question of negligence are undisputed, and that question is therefore to be determined by the court as a matter of law.

Judgment is reversed, with instruction to sustain appellant's motion for a new trial.

ACTION FOR DEATH

HEGERICH v. KEDDIE.

(99 New York, 258.—1885.)

APPEAL from a judgment of the General Term of the Supreme Court entered upon an order, which reversed a judgment in favor of the defendant, entered upon an order sustaining a demurrer to plaintiff's complaint (32 Hun, 141), in an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant's testator.

RUGER, CH. J. A brief reference to some of the elementary principles, applying to civil actions will serve the purpose, at least, of defining the terms used, and the modifications introduced, into the law by the statutes hereinafter referred to. Such actions were primarily divided into two classes, distinguished as actions *ex contractu* and *ex delicto*. The actions known as detinue, trespass, trespass on the case, and replevin were those used in causes of action arising from torts, and were described as actions *ex delicto*. Trespass on the case was the appropriate form of remedy for all injuries to persons or property which did not fall within the compass of the other forms of action. (3 Stephens' Com. 449.) At common law, originally, all actions arising *ex delicto* died with the person by whom or to whom the wrong was done. Thus, when the action was founded on any malfeasance, or misfeasance, was a tort, or arose *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind, where the declaration imputes a tort done either to the person or property of another, and the plea must be "not guilty," the rule was "*actio personalis moritur cum persona*." (1 Wms. on Exrs. 668.) It was, however, held in *Hambly v. Troth* (Cowp. 371), Lord MANSFIELD delivering the opinion, that, "if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., then the person injured has only a reparation for the *delictum*, in damages to be assessed by a jury. But, when, besides the crime, property is acquired which benefits the testator, then an action for the value of the property

shall survive against the executor." "So far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor, therefore, shall be charged." By this statute of 4th Edward III, chapter 7, actions "*de bonis asportatis*" were given to the executors of a deceased person for personal property taken from their testator and carried away, but for all other causes of action arising out of wrongs done either to the person or property the rule of "*actio personalis moritur cum persona*" applied. (1 Wms. Exrs. 672.) Under the clause of the Constitution making the rules of the common law the law of the State, it must be held that these rules still determine the survivability of actions for torts, except where the law has been specially modified or changed by statute.

It has been held in this State prior to the enactment of the Revised Statutes that an action against the representatives of a postmaster for money feloniously abstracted from a letter by his clerk (*Franklin v. Low*, 1 Johns. 402), and against a sheriff's representatives for an escape occurring during his life-time (*Martin v. Bradley*, 1 Caines, 124), did not lie against such representatives. In the case of *People v. Gibbs*, 9 Wend. 29, decided in 1832, it was held that an action against the executors of a sheriff for the default of his deputy in returning process, notwithstanding an action in *assumpsit* for money had and received was by statute authorized therefor, did not lie, inasmuch as the cause of action was founded in tort.

As no reference is made in this case to the Revised Statutes, it is inferred that it arose previous to their enactment, although the case does not disclose that fact. Still the date of the trial, November, 1830, would not necessarily lead to such an inference. The Revised Laws (Vol. 1, p. 311) had theretofore enlarged the scope of the statute of 4th Edward III., and provided for actions by and against executors and administrators for property taken and converted by the testator or intestate during his life-time. Under this condition of the law the provisions of the Revised Statutes were enacted in 1828, and contain the rule by which this controversy must be determined. Section 1 reads as follows: "For wrongs done to the property rights or interests of another for which an action might be maintained against the wrongdoer, such action may be brought *by the person injured*, or after his death, by his executors or administrators against such wrongdoer, and after his death, against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract." Section 2. "But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery or false imprisonment, nor to actions on the case for injuries to person of the plaintiff

or to the person of the testator or intestate of any executor or administrator." It cannot be successfully claimed that the language, "actions on the case for injuries to the person" up to this time did not include, according to universal classification, all actions without regard to the person or persons to whom they accrued, which had as their cause, or were founded upon injuries to the person of another arising from the negligent or careless conduct of a wrongdoer. It must also, upon well-settled principles of construction, be conceded that these terms were used according to their legal and well-understood signification at the time of their employment. If the language of the statute applicable to this case be collocated and read according to its plain meaning and intent, the following sentence would seem to be the result. Actions by and against executors and administrators for wrongs done to the property rights, or interests of their intestate or testator are hereby authorized, but so far as such wrongs have heretofore been remediable by actions on the case for injuries to the person of the plaintiff, or to the person of the intestate or testator of any executor or administrator, they shall not survive the death of the person to whom or by whom the wrong is done. The wrongs referred to in these sections are such only as are committed upon the "property rights, or interests" of the testator or intestate, and to a cause of action for which the executors and administrators acquire a derivative title alone. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action.

Among the questions which have arisen over the construction of these sections the most prominent are probably those relating to the signification of the words "property rights or interests," as used in the first section, and the effect of the enumeration in the second section, of certain specific actions as being excepted from the operation of the prior section. It is inferable from the opinions expressed in *Haight v. Hayt*, 19 N. Y. 464, that the court there supposed that the words "property rights or interests," as used in the statute, covered and included all injuries tortiously inflicted by one person to the detriment of another, whether affecting his person or property, and also that the mention of certain actions in the second section manifested an intention on the part of the law makers to exempt all others, founded on tort from abatement by death. The views expressed on those questions seem to have been unnecessary, as the action there, was for a fraudulent representation with respect to incumbrances, whereby a purchaser of land at a public sale was induced, and the purchaser was compelled to pay an incumbrance which he was led to believe did not exist. The injury thus seems clearly to have been one to rights of property alone and was saved from abatement by the first section of the statute. The language

and structure of these sections would seem to repel the idea that the exemptions provided by the second section were intended to authorize the survival of all other actions for tort. In the view implied by the language used in that case the first section would be quite unnecessary, as a provision specifying the classes of action which did survive would be superfluous if conjoined with one enumerating all actions not surviving. Such a construction gives the first section no office to perform, and the courts have practically rejected this interpretation in numerous cases, holding that causes of action abated by death which were not named in the second section. Thus it has been held that a cause of action by a master for the seduction of his servant does not survive (*People ex rel. v. Tioga Com. Pleas*, 19 Wend. 73); or for a fraudulent representation by a third person in reliance upon which credit is given to an irresponsible person (*Zabriskie v. Smith*, 13 N. Y. 322); or for a breach of promise to marry (*Wade v. Kalbfleisch*, 58 id. 286); or for damages occasioned by the negligent killing of another (*Whitford v. Panama R. R. Co.*, 23 id. 465); or for a penalty incurred by trustees under the General Manufacturing Act (*Stokes v. Stickney*, 96 id. 323); and for fraud in inducing one to marry another (*Price v. Price*, 75 id. 244).

The statute obviously created a great change in the law and applied to a numerous class of cases which had not before been held to survive. Thus it enlarged the rights created by the act of 4 Edward III., so as to include actions for trespass *de bonis asportatis* against representatives as well as by them, and removed the limitation which authorized other actions for wrongs against representatives only when the estate of their testator or intestate was benefited by the act complained of. The change is illustrated by the case of *Benjamin's Exrs. v. Smith*, 17 Wend. 208, where it was held that the cause of action accruing to a party against a sheriff for a false return did not abate by the plaintiff's death. This had previously been held otherwise. (*People v. Gibbs*, *supra*.) In *People v. Tioga Com. Pleas*, 19 Wend. 73, it was held that such actions alone as survived to executors and administrators were assignable, and that a cause of action by a master for the seduction of his servant was not assignable.

Although this action is based upon the theory of a loss of service by the master, it must inferentially have been determined that it did not affect the property rights or interests of the master, in such manner as to cause the right of action to survive. GROVER, J., in *Haight v. Hayt*, said "that the statute had changed the law so far as property or relative rights are affected by the wrongful act." Judge RAPALLO has said that "the rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests

by injuries to which the estate of the deceased is diminished." (*Cregin v. B. C. R. R. Co.*, 75 N. Y. 194.)

Reference to the law as it stood previous to the revision (and the application of the rule of construction embodied in the maxim of *noscitur a sociis*) would seem to require such an interpretation of the words "property rights or interests" as will confine their application to injuries to property rights only, and such as were theretofore enforceable by the deceased.

It is stated in 1 Wms. on Exrs. 677, "that no action is maintainable by the executor or administrator upon an implied or express promise to the deceased when the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate." *Chamberlain v. Williamson*, 2 M. & S. 408, is cited in support of this proposition. In that case Lord Ellenborough said:

"Executors and administrators are the representatives of the personal property, that is the debts and goods of the deceased; but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate." Accordingly it was there held "that an executor or administrator cannot have an action for a breach of promise of marriage to the deceased when no special damage to the personal estate can be stated on the record. So with respect to injuries affecting the life and health of the deceased, all such as arise out of the unskillfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney, such cases being in substance actions for injuries to the person."

This view of the law was approved in a similar case in this court. (*Wade v. Kalbfleisch*, *supra*.) It was said in *People v. Tioga Com. Pleas*, (*supra*), by COWEN, J., that the cases in respect to executors and insolvent assignees, and the like, certainly go very far to direct what we are to consider matter of property or estate, so far that it can be touched by a contract, and made a subject of transfer between parties in any way at law or in equity; if the right be not so entirely personal that a man cannot by any contract place it beyond his control, it is assignable under the statutes of insolvency, or will, on his death, pass to his executors. The reason is because it makes a part of his estate; it is matter of property, and as such it is in its nature assignable. On the contrary, if it be strictly personal, it is beyond the reach of contract. In the same sense we say of many rights they are inalienable. No one would pretend that a man's person could be specifically affected by contract; though he should bind himself by indenture, equity could not enforce the agreement. (*Mary Clark's lease*, 1 Blackf. 122.) So of a man's absolute personal rights in general, as his claim to safety from violence, and his relative rights as a husband, a father, a master, a trustee, etc." This case was approved in *McKee v. Judd*, 12 N. Y. 622,

and it was there said by GROVER, J., that "demands arising from injuries strictly personal, whether arising upon tort or contract, are not assignable; but that all others are." In *Green v. Hudson R. R. Co.*, 28 Barb. 9, approved in *Whitford v. Panama R. R.* (*supra*), it was held that the husband at common law could not maintain an action for negligence causing the death of his wife; and that continued to be the law in this State until the act of 1847 was amended by chapter 78 of the laws of 1870. It was said by Judge DENIO in *Whitford v. Panama R. R. Co.*, (*supra*), "It has never been suggested, so far as I know, that the personal representatives of a deceased person could at the common law sustain an action on account of the wrongful act of another, which caused the death of the person whose estate they represent." It would seem unnecessary to cite additional authorities to the effect that as the law stood at the adoption of the statute, neither a husband nor wife had such an interest in the life of their respective consorts as subjected a person, through whose negligent act it was taken, to the charge of injuring any property rights possessed by them.

From the same review, it is quite evident that the authors of the statute intended explicitly to provide for the abatement of causes of action for personal injuries occurring to the plaintiff, or to his intestate or testator. The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute, as it is possible to lay down. *People v. Tioga Co. Com. Pleas*, *supra*; *Zabriskie v. Smith*, *supra*.

The rights of property only which are in their nature assignable and capable of enjoyment by an assignee are those referred to in the statute. Such rights as arise out of the domestic relations clearly do not possess the attributes of property, and are not assignable by the possessor. (*Id.*)

The provisions of the Revised Statutes were, however, modified by chapter 450 of the laws of 1847, as amended by subsequent statutes, giving an action against persons and corporations, to the representatives of a deceased person, for the benefit of the husband or widow and next of kin, to recover damages for the pecuniary injuries suffered by them where death was caused by the wrongful act, neglect or default of another and the act, neglect or default was such as would (if death had not ensued) have entitled the party injured to maintain an action therefor, and in respect thereof against the person who or the corporation which caused the same, although the death was caused under such circumstances as in law amounted to a felony.

We are now to consider the effect which these statutes produced upon the law as it previously existed. The cause of action here provided for has been held not to be a devolution, but a new one calling for the application of another rule of damage and distinguished by many other

attributes. *Whitford v. Panama R. R. Co.*, *supra*; *Haight v. Hayt*, 19 N. Y. 464; *McDonald v. Mallory*, 77 id. 546; *Littlewood v. Mayor, etc.*, 89 id. 24; *Blake v. Midland R. R. Co.*, 18 A. & E. 93; *Leggott v. Gt. N. Ry. Co.*, L. R. 1 Q. B. D. 604; *Russell v. Sunbury*, 37 Ohio St. 372; *Yertore v. Wiswall*, 16 How. Pr. 8. That it is founded upon the wrongful act of the party causing the death, and gives a right of action therefor to the representatives of the deceased, for the pecuniary consequences suffered by the husband, wife or next of kin from such wrongful act is also established by the same authorities.

The cause of action is obviously the wrongful act, and the pecuniary injuries resulting afford simply a rule to determine the measure of damages. However much the husband, widow or next of kin may suffer pecuniarily by the act causing death, it constitutes no cause of action, independent of evidence, that it was occasioned by the wrongful or negligent conduct of another. Proof that it occurred in consequence of the contributory negligence of the deceased person, or without the fault of the defendant, furnishes a perfect answer to such an action and a conclusive reason why the death produced by the wrongful act is the cause of action. The cause of action here provided for does not purport to be in any respect a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured, for his damages. The description of the actionable cause, seems to have been inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action. *Whitford v. Panama R. R. Co.*, *supra*.

It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or impliedly, to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party.

The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action enforceable against, as well as by representatives. The cause of action thereby given is not to the estate of the deceased person, but to his or her representatives as trustees, not for purposes of general administration, but for the exclusive use of specified beneficiaries. *Dickins v. N. Y. Cent. R. R. Co.*, 23 N. Y. 158; *Yertore v. Wiswall*, 16 How. Pr. 8.

The wrong defined indicates no injury to the estate of the person

killed, and cannot either logically or legally be said to affect any property rights of such person, unless it can be maintained that a person has a property right in his own existence. The property right, therefore, created by this statute is one existing in favor of the recovery only, and depends for its existence upon the death of the party injured. It had no previous life and cannot be said to have been injured by the very act which creates it. Whatever claim a wife or children have at law upon the husband and father for support perishes with the life of such person, and thereafter their claims upon his estate are governed by statutory rules.

If, therefore, we consider this cause of action as a property right, it is as such, a right based upon a tort, and, except as otherwise provided by the statute creating it, must be governed by the existing rules of law applicable to such causes of action. The case of *Littlewood v. Mayor, etc.*, 89 N. Y. 24, holding that such causes of action may be settled and discharged by the injured party during his life-time, would seem to preclude the idea that the husband or widow and next of kin had any right of property in the cause of action created by the death of the party injured during his life-time. The question presented by the decision herein was, we think, determined adversely to the plaintiff by the case of *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192. It was there held when an injury is done to the person of the plaintiff (and necessarily, by the terms of the statute, to that of his testator or intestate), "that the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single and consists of the injury to the person. The damages are the consequences merely of that injury, and when, by the terms of the statute, such a cause of action abates, the character of the damages cannot save it." The conclusions reached in that case tend necessarily to the support of the doctrine that the causes of action given by the act of 1847 and its amendments abate by the death of the person injured. It also holds that, so far as the personal estate and rights of property of the deceased person are injured by the wrongful act causing death, the cause of action therefor survives to his representatives by force of section 1 of the Revised Statutes, before referred to. Such an action exists independently of the Statute of 1847, and has been upheld in favor of representatives to the extent of giving damages for medical attendance and inability of the injured party to attend to business, for the time intermediate his injury and death, when the accident occurred while traveling as a passenger upon the defendant's railroad. The action was there based upon the theory of a breach of contract to carry the passenger safely. *Bradshaw and wife v. Lancashire & Yorkshire Ry. Co.*, L. R. 10 C. P. 189.

We have carefully considered the case of *Needham v. Grand T. R. R.*

Co., 38 Vt. 294, but inasmuch as the statutes in that State affecting the question are so different from our own, little analogy exists between the question there presented and the one under consideration. The case of *Yertore v. Wiswall*, (*supra*) is entitled to great respect from the learning and ability of the court by which it was decided. But, although agreeing with some of the propositions entertained by it, we are unable to concur in the conclusion reached, that the cause of action there considered, survived.

The complaint in the present action describes a cause of action arising out of the death alone, and suggests no injury to the estate or property of the deceased. Such a cause of action is abated by the death of the wrongdoer.

The judgment of the General Term should, therefore, be reversed, and that of the Special Term affirmed.

All concur; FINCH, J., in result.

*Judgment accordingly.*¹

¹ See Pollock on Torts, 7th ed., 60-72; Erwin's Summary of Torts, 2d ed., 37-53.

The rule that a personal action dies with the person still applies, in all its strictness, wherever the common law has been adopted, unless modified or changed by express enactment. In New York, in actions to recover for death the result of wrongful act, neglect or default, the maximum amount of recovery (\$5,000), fixed by chapter 256 of the Laws of 1849, has been abolished, and "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." N. Y. Const., Art. I., § 18. For general provisions applicable to such right of action, see N. Y. Code Civ. Pro. §§ 1902-904.

PARTIES LIABLE.

INFANTS.

HUCHTING V. ENGEL.

(17 Wisconsin, 230.—1863.)

ERROR to the Circuit Court.

Action to recover for breaking and entering plaintiff's premises, and breaking down and destroying his shrubbery and flowers therein standing and growing. The answer, after a general denial, stated that if defendant ever committed the alleged trespass, "he did so through the want of judgment and discretion, being an infant of about six years of age."

The circuit court, on appeal, reversed the judgment rendered against the defendant for \$3 damages and costs, and the plaintiff sued out the present writ of error.

By the Court, DIXON, C. J. "Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." 2 Kent's Com. 241.

"Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded; for in such a case a lunatic is as liable to compensate in damages as a man in his right mind." Reeve's Dom. Rel. 258.

"The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as to an action for slander, an action of trover for property embezzled, or an action grounded on fraud committed." Macpherson on Infants, 481 (41 Law Lib. 305).

"Infants are liable for torts and injuries of a private nature; as disseins, trespass, slander, assault, etc." Bingham on Infancy, 110.

"All the cases agree that trespass lies against an infant." *Hartfield v. Roper*, 21 Wend. 620.

This is the language of a few of the many writers and courts who have spoken upon the subject. All agree, and all are supported by the authorities, with no single adjudged case to the contrary. *Jennings v. Randall*, 8 Term, 335; *Sikes v. Johnson*, 16 Mass. 389; *Homer v. Thwing*, 3 Pick. 492; *Campbell v. Stakes*, 2 Wend. 137; *Bullock v. Babcock*, 3

Wend. 391; *Neal v. Gillett*, 23 Conn. 437; *Humphrey v. Douglass*, 10 Vermont, 71. In the latter case the minor was held answerable for a trespass committed by him although he acted by command of his father.

The authorities cited by the counsel for the defendant in error have no bearing upon the question. They relate to the criminal responsibility of infants; to the question of negligence on their part, as whether it can be imputed to them so as to defeat actions brought by them to recover damages for personal injuries sustained in part in consequence of the negligence or unskilfulness of others; and to the liability of parents and guardians for wrongs committed by infants under their charge by reason of the neglect or want of proper care of such parents or guardians. The case at bar is none of these. The defendant is not prosecuted criminally; the action is not by him to recover damages for personal injury occasioned by the joint negligence of himself or his parents, and another; nor is the liability of the parents involved. The suit is brought to recover damages for a trespass committed by him; not vindictive or punitive damages, but compensation; and for that he is clearly liable. If damages by way of punishment were demanded, undoubtedly his extreme youth and consequent want of discretion would be a good answer.

Judgment of the circuit reversed, and that of the justice of the peace affirmed.

FITTS V. HALL.

(9 New Hampshire, 441.—1838.)

CASE. The declaration alleged, that on May 26, 1830, the plaintiff was the owner of a quantity of palm-leaf and chip hats; that a conversation was then had between the parties about the defendant's purchasing the hats; that the plaintiff, not knowing whether the defendant was of age, inquired of him whether he was of full age or not; that the defendant, well knowing that he was an infant under the age of twenty-one years, and intending to deceive and defraud the plaintiff, falsely represented that he was then of full age; and that the plaintiff, relying thereon, sold and delivered the hats to the defendant, and took his note therefor for the sum of \$57.00. The declaration further set forth, that the note not being paid when due, the plaintiff sued the defendant thereon; that the defendant pleaded the general issue and infancy; that the plaintiff joined the general issue, and to the plea of infancy replied that the defendant represented himself to be of full age, etc.; that to this replica-

tion there was a demurrer and joinder, and the plaintiff became nonsuit, the defendant recovering judgment for costs, taxed at \$37.62; and that the defendant has never paid said note, nor redelivered the hats to the plaintiff, nor paid him therefor.

There was also a count in trover for the hats.

The jury found a verdict for the plaintiff for \$128.91; whereupon the defendant moved that the verdict be set aside, and a nonsuit entered.

PARKER, C. J. The general principle applicable to this case is, that an infant is liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds. 2 Kent's Com. 197; 1 Chitty's Pl. 65.

Thus he is liable in trover, although the goods converted were in his possession by virtue of a previous contract. *Vasse v. Smith*, 6 Cranch, 231; *Homer v. Thwing*, 3 Pick. 492. And in detinue, where he received skins to finish, and afterwards withheld them. *Mills v. Graham*, 4 Bos. & Pul. 140. And assumpsit for money had and received, has been sustained against an infant for money embezzled. *Bristow v. Eastman*, 1 Esp. 172; s. c. Peacke, 222.

But a matter of contract, or arising *ex contractu* and properly belonging to that class, is not to be turned into a tort, in order to charge the infant by a change of the form of action. Kent's Com. 197. As, for instance, where the plaintiff declared that having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, etc.; held that infancy was a good plea in bar. *Green v. Greenbank*, 2 Marshall, 485; s. c. 4 E. C. L. 375.

In *Jennings v. Randall* the plaintiff declared in case, that, at the request of the defendant, he delivered to him a certain mare, to be moderately ridden, and the defendant wrongfully rode her in an immoderate, excessive and improper manner, and took so little care of her, that by reason thereof she was strained and damaged; and in a second count alleged that he delivered the mare to the defendant to go and perform a reasonable and moderate journey, and the defendant wrongfully rode and worked her a much longer journey. On a demurrer to a plea of infancy, the court considered the action as founded substantially on the contract, and gave judgment for the defendant. Lord KENYON said: "The plaintiff let the mare to hire, and in the course of the journey an accident happened, the mare being strained, and the question is, whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants." 8 D. & E. 336.

It is undoubtedly true, that the substance of all the matter thus

alleged in the plaintiff's declaration, in *Jennings v. Randall*, might have been set forth in an action of assumpsit; and regarding it, as Lord KENYON did, as an injury resulting from an accident, it would seem to be an attempt to convert an action founded on contract into a tort. But the attention of the court does not seem, in the opinion delivered, to have been directed to the question whether part of the matter thus alleged might not, upon proper proof, have sustained the count in trover, which was also contained in the declaration, or an action of trespass.

It is apparent, from the cases before cited, that an infant may be charged for a tort arising subsequent to a contract, and so far connected with his contract that but for the latter the tort would not have been committed. In *Homer v. Thwing*, the defendant hired a horse to go to a place agreed on, but went to another place, in a different direction, and he was held liable in trover for an unlawful conversion.

And in *Campbell v. Stakes*, 2 Wendell, 137, where an infant took a mare, on hire, and drove her with such violence, and otherwise cruelly used her, that she died, it was held that trespass might be maintained against him, and the judgment of the supreme court was unanimously confirmed by the court of errors. Chancellor WALWORTH said: "If the infant does any wilful and positive act, which amounts on his part to an election to disaffirm the contract, the owner is entitled to the immediate possession. If he wilfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse an action of trover would lie, and his infancy would not protect him."

The principle to be deduced from these authorities seems to be, that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

Upon this principle the count in trover, in this case, cannot be supported, upon the evidence offered. The goods went into the possession of the defendant by virtue of a contract, which he has avoided by reason of his infancy. The effect of that contract was to authorize him to appropriate the goods to his own use as owner, and to dispose of them at his pleasure. If he has done so by using them, or selling them to third persons, so that he cannot redeliver them, neither his refusal to pay, nor a refusal to deliver the goods, can be considered as anything more than a breach of contract. A refusal to pay is a breach of the express contract, and a refusal to return the goods, after he had converted them with the assent of the plaintiff, and when he no longer had it in his power to return them, could be considered as no more than a breach of an implied

assumpsit to return the goods, upon request, after he had rescinded the contract by a refusal to pay. Were this otherwise, the law would furnish him no protection against his contract, in such case; for by a subsequent demand of the goods, which he had not the power to comply with, he would be made liable for their value in trover, although he could not be charged in assumpsit. It does not appear in this case that there was such a demand; but if one was made, there is no evidence that the defendant, after he denied his liability on the contract, could have complied with it.

Still less is there any ground for charging the defendant in trover, because the plaintiff was induced to make the contract, upon which he received the goods, by his misrepresentations. The goods were, notwithstanding received upon a contract, and if the contract had not been rescinded by the defendant, upon the ground of his infancy, there would have been no pretence for an action of trover. His thus rescinding it cannot be held of itself, to be a conversion.

. If after the defendant in this case had interposed his plea of infancy, and refused to perform the contract, the plaintiff had demanded the hats, and the defendant, having them in his possession, had refused to deliver them, that would have been a wilful, positive wrong of itself, disconnected from the contract, and upon such evidence the count in trover might have been maintained. Where goods were sold to an infant, on a credit, upon his representation that he was of full age, and a plea of infancy was interposed, an action of replevin was sustained against his administrator, after a demand upon him. *Badger v. Phinney*, 15 Mass. 359. In this latter case, the defence of infancy was made by the administrator of the infant; the demand of the goods was made upon him and the action sustained against him; but the court said: "The basis of this contract has failed, from the fault, if not the fraud of the infant; and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff." And upon this ground, if the infant, having rescinded his contract, withholds the goods purchased, after a demand which he had power to comply with, there seems to be no good reason why he should not answer in trover, the same as for any other conversion of property lawfully in his possession. 6 Cranch, 231; 4 B. & Pul. 140, before cited.

The next question is, whether this action can be maintained against the defendant, for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats, on a credit, and to take his note.

An action may be maintained for false and fraudulent representations, in order to induce a party to sell, and whereby he was induced to sell, goods to one of the defendants, on a credit. *Livermore v. Herschell*, 3 Pick, 33, 36.

But *Johnson v. Pie*, 1 Lev. 169, was "case, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him 100*l.*, and so he had cheated the plaintiff by this false affirmation." After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others. "Kelynge and Wyndham held, that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass, felony, etc., for there is a fact done. Twysden doubted, for that infants are chargeable for trespass. Dyer, 105. And so, if he cheat with false dice," etc. The report in Levinz states that the case was adjourned, but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested.

If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron COMYNS, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, "Action on the Case for Deceit," but lays down the rule that, "If a man affirms himself of full age when he is an infant, and thereby procures money to be lent to him upon mortgage," he is liable for the deceit; for which he cites 1 Sid. 183; Com. Dig. Action, &c., A. 10.

We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in action *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds (2 Kent, 197), as for slander (*Hodsman v. Grissel*, Noy, 129) and goods converted (auth. *ante*), there is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation, whereby another has received damage.

In the argument of *Johnson v. Pie*, Grove and Nevill's case was cited, "where, in case against an infant, for selling a false jewel, affirming it to be a true one, it was adjudged the action did not lie," and the case seems to have been considered as if the affirmation that he was of age was to be regarded as part of the contract. But there is a wide difference between the two cases. In Grove and Nevill's case, the subject-matter of the contract was the jewel which was sold. The affirmation that it was a true one was a false warranty of the article sold. If the defendant had been of age, *assumpsit* might have been maintained. The infant was not to be charged, by adopting a different form of action. But the representation in *Johnson v. Pie*, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's

age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with the contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract.

It has been said that "all the infants in England might be ruined," if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be committed.

In Bac. Abr., Infancy, I, 3, it is said: "Also, it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, &c., he make any contract or agreement, with an intent afterwards to elude it by reason of his privilege of infancy, that a court of equity will deem it good against him according to the circumstances of the fraud." 3 Gwillim's Bac. 604. The authorities cited do not seem to state, specifically, the first branch of the proposition in the text; but there are several cases sustaining the general proposition that an infant may be bound, in equity, by a contract which the other party has been induced to enter into by his fraudulent representation or concealment. *Lord Teynham v. Webb*, 2 Ves. Sen. 212; *Evroy v. Nicholas*, 2 Eq. Cas. Abr. 489, and cases cited; *Beckett v. Cordley*, 1 Brown's Ch. 358; *Fonblanque's Eq.* (4 Am. ed.) 80, note, z. At law, he is not bound by the contract, although it was procured by his fraudulent representation that he was of full age. *Conroe v. Birsdall*, 1 Johns. Cas. 127. If, in equity, the infant may be bound by the contract, because of his fraud in procuring it, he may well, at law, be answerable for the previous deceit through which it was procured, if he has thereby obtained the property of another and refuses performance on his part.

Our conclusion is that the action may be sustained on the first count.

But we are of opinion that the plaintiff is not entitled to recover, in damages, the costs of the action he commenced on the note, or those which he was obliged to pay in that suit. For aught which appears, he knew, when he commenced that action, that the defendant was an infant, and would avail himself of his infancy. If he chose to try an experiment, he must abide the consequences. For this reason the verdict must be set aside, and

New trial granted.

SLAYTON V. BARRY.

(175 Massachusetts, 513.—1900.)

ACTION for deceit and for conversion.

The trial judge was requested by the plaintiff to charge:

1. That if the defendant, a minor, for the purpose of defrauding the plaintiff and inducing him to sell and deliver goods to the defendant falsely represented that he was of full age, and the plaintiff, relying on such representation, was thereby induced to sell and deliver goods to the defendant, who subsequently repudiated his purchase and refused to pay for the goods for the reason that he was a minor, he is liable in damages. 2. That if the defendant, a minor, purchased goods of the plaintiff, obtained possession of them, converted them to his own use, and subsequently repudiated the purchase and refused to pay for the goods, for the reason that he was a minor, the plaintiff at the time of the purchase having no knowledge of the defendant's minority, the effect of the avoidance by the defendant of his contract was to make it void from the beginning, and to render him liable in damages for the conversion of the goods. This was refused.

Verdict was directed for the defendant, and the plaintiff excepted.

MORTON, J. The declaration in this case is in two counts. The first count alleges in substance that the defendant intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age and thereby induced the plaintiff to sell and deliver to him the goods described, and though often requested had refused to pay for or return the goods but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. *Merriam v. Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson v. Pie*, 1 Lev. 169; 1 Sid. 258; 1 Keb. 905. *Grove v. Nevill*, 1 Keb. 778. *Jennings v. Rundall*, 8 T. R. 335. *Green v. Greenback*, 2 Marsh. 485. *Price v. Hewett*, 8 Ex. 146. *Wright v. Leonard*, 11 C. B. (N. S.) 258. *De Roo v. Foster*, 12 C. B. (N. S.) 272. *Gilson v. Spear*, 38 Vt. 311. *Nash v. Jewett*, 61 Vt. 501. *Ferguson v. Bobo*, 54 Miss. 121. *Brown*

v. *Dunham*, 1 Root, 272. *Geer v. Hovy*, 1 Root, 179. *Wilt v. Welsh*, 6 Watts, 9. *Burns v. Hill*, 19 Ga. 22. *Kilgore v. Jordan*, 17 Tex. 341. Benjamin, Sales (6th ed.) s. 23. Cooley, Torts, (2d ed.) 126. Add. Torts, (Wood's ed.) s. 1314. See *contra*, *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235; *Hall v. Butterfield*, 59 N. H. 354; *Rice v. Boyer*, 108 Ind. 472; *Wallace v. Morss*, 5 Hill, (N. Y.) 391.

The general rule is, of course, that infants are liable for their torts. *Sikes v. Johnson*, 16 Mass. 389. *Homer v. Thwing*, 3 Pick. 492. *Shaw v. Coffin*, 58 Maine, 254. *Vasse v. Smith*, 6 Cranch, 226. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts but of protection from their contracts. The true rule seems to us to be as stated in *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely, if the fraud "is directly connected with the contract . . . and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent Com. 241, as follows: "The fraudulent act, to charge him (the infant) must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether as an original proposition it would be better if the rule were as laid down in *Fitts v. Hall* and *Hall v. Butterfield*, in New Hampshire, and *Rice v. Boyer*, *ubi supra*, in Indiana, we need not consider. The plaintiff relies on *Homer v. Thwing*, 3 Pick. 492, *Badger v. Phinney*, 15 Mass. 359, and *Walker v. Davis*, 1 Gray 506. In *Walker v. Davis* there was no completed contract and the title did not pass. The sale of the cow by the defendant operated therefore clearly as a conversion. *Badger v. Phinney* was an action of replevin, and it was held that the property had not passed, or if it had that it had reverted in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In *Homer v. Thwing* the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled.

So ordered.

MOORE V. EASTMAN.

(1 Hun, 578.—1874.)

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

This action was brought to recover against the defendant in trespass for an injury to a horse of the plaintiff. The answer denied the complaint, and sets up a contract of bailment and infancy. Evidence was given on the part of the plaintiff to show that he let the horse to the defendant for two days; that the horse was taken sick on the journey, and that such sickness was occasioned by overdriving; that the defendant, against the advice of the doctor and hotel keeper, drove the horse, while so sick, at a fast gait; and that shortly after the horse reached the plaintiff's stable he died from the effects of such overdriving.

GILBERT, J. The complaint avers a wrongful taking of the horse by the defendant, and that in consequence of his malicious, wicked, and cruel treatment the horse died. The defense is infancy, and that at the time the alleged wrongful acts were committed the horse was in the possession of the defendant, by virtue of a contract of bailment for hire, and that said wrongful acts occurred solely through the unskillfulness and want of judgment of the defendant, and not from any intentional or malicious or willful act or wrong on his part. The question is, what proof is requisite to a recovery upon such an issue? Acts, however aggravated, which merely establish a breach of the contract on the part of an infant, manifestly are insufficient. The plaintiff cannot convert anything that arises out of a contract with an infant into a tort, and then seek to enforce the contract through the medium of an action *ex delicto*. There must be a tort, independent of the contract. The authorities all agree on this principle. In *Jennings v. Rundall*, 8 T. R. 335, it was held that when a boy hired a horse, and injured it by immoderate driving, this was only a breach of contract, for which he was not liable. So, in *Green v. Greenback*, 2 Marsh. 485, the court of common pleas, in England, held that an infant was not liable to an action for falsely and fraudulently deceiving the plaintiff in an exchange of horses, because the deceit was practiced in the course of the contract. The principle of these cases was unanimously approved by the late court for the correction of errors, in *Campbell v. Stakes*, 2 Wend. 137, which was an action of trespass for misusing a mare hired by the defendant, who was an infant. It was held in that case that a bare neglect to protect the animal from injury, and to return it at the time agreed upon, would not subject an infant to an action of trespass, but that the

infant must do some willful and positive act, which amounts to an election on his part to disaffirm the contract; that if the infant willfully and intentionally injured the animal, an action of trespass would lie against him for the tort; but that if the injury complained of occurred in the act of driving the animal, through the unskillfulness and want of knowledge, discretion, and judgment of the infant, he would not be liable. The rule thus established has not been changed in this state, to my knowledge, but, on the contrary, has been repeatedly recognized and approved. *The People v. Kendall*, 25 Wend. 399; *Munger v. Hess*, 28 Barb. 75; *Robbins v. Mount*, 4 Rob. 553. What, then, is the willful and positive act which amounts to an election to disaffirm the contract? Certainly, such an act cannot be predicated of a use of the animal in the course of the bailment, however excessive, unless the excess was such as to indicate that it was resorted to for a purpose beyond that for which the horse was hired. Nothing of that kind appears in this case. Instances of the kind of wrong that will make an infant liable are not wanting in the adjudged cases. *Burnard v. Haggis*, 14 C. B. (N. S.) 45, where an infant hired a mare on the terms that it was to be ridden on the road, and not over fences in the fields, and the infant lent it to a friend, who took it off the highroad, and, in endeavoring to jump the animal over a fence, transfixed it on a stake and killed it; *Towne v. Wiley*, 23 Vt. 355, *Homer v. Thuwing*, 3 Pick. 492, *Lucas v. Trumbull*, 15 Gray, 307, and *Fisk v. Ferris*, 5 Duer, 49, where the infant drove the horse further than the stipulated journey, or on a different one; and cases where an infant obtains goods by fraud, and then refuses to deliver them up on the demand of the party who has been defrauded, or where he has been intrusted with them for a special purpose, and has perverted them to another purpose—may be taken as examples. They are all consistent with, and at least furnish a negative confirmation, of the principle before alluded to, that a mere violation of a contract, though attended with tortious results, will not make the infant liable, but that to have that effect the act must be wholly tortious.

In the case before us, taking the evidence on the part of the plaintiff alone, the defendant is fairly chargeable with only two or three acts of immoderate driving of the horse while performing the service for which he was hired, and with driving him when not in a fit condition to continue that service. There was no other basis for the inference that the injury to the horse was positive or willful.

The question whether the injury was of that character, or was the result of indiscretion, or want of skill and judgment on the part of the defendant, was fairly submitted to the jury, and we think their verdict was correct.

Several requests were made to the judge to modify his charge. One of them was that if the jury should find the horse was overdriven, and

in a cruel and unusual manner, they might infer the intent from such cruel driving. This was properly refused, because there was no evidence of such cruelty. The other requests, though variant in form, presented merely the converse of the propositions embraced in the judge's charge, and, of course, were properly refused. The judgment must be affirmed.

Judgment affirmed.

FREEMAN V. BOLAND.

(14 Rhode Island, 39.—1882.)

DURFEE, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defence to an action *ex delicto*, for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandoning it, the bailment being thus determined.

The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action, but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved. *Homer v. Thwing*, 3 Pick. 492; *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85; *Fish v. Ferris*, 5 Duer, 49; *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207; *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519; *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561; Add. Torts, § 1314.

* * * * *

*Exceptions overruled.*¹

¹ *Contra, Doolittle v. Shaw*, 92 Ia. 348. Compare, *Spooner v. Manchester*, 133 Mass. 270.

LUNATICS.**JEWELL V. COLBY.**

(66 New Hampshire, 399.—1890.)

ACTION to recover damages for the death of plaintiff intestate, alleged to have been caused by the wrongful act of the defendant, under such circumstances as amount in law to felony, except as the same might be modified by proof of the defendant's insanity.

BINGHAM, J. In the agreed case, it appears that the defendant is guilty of causing the death of Martha Fortier by his wrongful act, unless it is otherwise by reason of insanity. The question presented is, whether the defendant is liable for his torts, and especially those committed when insane. The executor or administrator of a deceased person, whose death was caused by the wrongful act or neglect of another, may recover damages of the wrongdoer for the injury to the deceased person and his estate caused by such act, although the death in law, may be a felony. The cause of action survives, and may be prosecuted by an executor or administrator, the same as by an injured person, when death does not ensue. Laws 1887, c. 71. *French v. Mascoma Flannel Co.*, ante, p. 90.

Generally an insane person is liable for his torts to the extent of compensation for the actual loss sustained by the injured party; but when the wrong lies in the intent, and the intent is an impossibility, there can be no recovery. Cool. Torts, 103; Sedgw. Dam. (5th ed.) 456, n. 1; 1 Hill Torts, 228, s. 4; *Lancaster Co. Nat. Bank v. Moore*, 78 Pa. St. 407; *Jackson v. King*, 15 Am. Dec. 368, n.; *Morain v. Devlin*, 132 Mass. 87; *Bullock v. Babcock*, 3 Wend. 391, 393. There may be an exception, however, in the case of an inevitable accident. *Brown v. Collins*, 53 N. H. 442, 451.

On the facts stated in the case, evidence of the defendant's insanity is not admissible to defeat the right to recover, or at all, unless the plaintiff claims punitive, exemplary, or a greater sum in damages than compensation for the actual loss sustained, and the action may be maintained. If greater damages are sought on account of the intent or malice of the defendant, insanity is a good answer to the same, as an insane person has no will or malice, and the measure of damages is compensation for the actual loss. *Krom v. Schoonmaker*, 3 Barb. 647.

Case discharged.

BLODGETT, J., did not sit: the others concurred.

WILLIAMS v. HAYS.¹

(143 New York, 442.—1894.)

APPEAL from a judgment of the General Term of the Supreme Court, which affirmed a judgment in favor of the defendant entered upon a verdict, in an action brought by the plaintiff, as assignee of the Phoenix Insurance Co., to recover the amount paid upon a policy of insurance issued to the firm of Parsons & Loud, as part owners of a vessel.

EARL, J. The defendant and others, among whom were Parsons and Loud, were joint owners of the brig "Sheldon." By an arrangement between the defendant and the other owners he took the vessel to sail on shares. He was to man the vessel, to pay the crew and to furnish the supplies, and he was to have one-half of her earnings, after certain deductions, for his share, and the other owners were to have from him the other half, after certain deductions, for their share. He was to have the absolute control and management of the vessel, and become her owner *pro hac vice*. *Webb v. Pierce*, 1 Curt. 113; *Thorp v. Hammond*, 12 Wall. 416; *Somes v. White*, 65 Me. 542.

The defendant, under the arrangement between him and the other owners, in no sense became their agent or servant. In *Webb v. Pierce* it was held that where a master hires a vessel on shares under an agreement to victual and man her, and employ her on such voyages as he thinks best, having thereby the entire possession, command and navigation of her, he thereby becomes her owner *pro hac vice*, and the relation of principal and agent does not exist between him and the owners. The other cases are to the same effect. The defendant thus became the charterer or lessee of the vessel and was responsible to the other owners for due care in her management, and so the trial judge held.

The case of *Moody v. Buck*, 1 Sand. 304, which holds that one co-owner of a vessel who takes and navigates her for his own benefit, is not liable to his co-owners for her loss by his carelessness, even if correctly

¹ "There are few decisions on the subject of the liability of insane persons for torts by negligence, and the text-writers appear to be in great conflict. Some of the latter hold that insanity is no defense. 1 Shearman and Redfield on Negligence, § 121; Cooley on Torts, 2d ed., 117. Others incline to the view that insanity should in some cases be a bar. 1 Beavan on Negligence, 2d ed., 52-55; Wharton on Negligence, §788; 2 Jaggard on Torts, 872; Clerk and Lindsell on Torts, 11, 34. The true view seems to be expressed by Mr. Justice Holmes: 'If insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.' Holmes, *The Common Law*, 109." X. Harvard Law Rev. 65.

For a criticism of this case, see X. Harvard Law Rev. 182.

decided upon the facts there existing, is not applicable to a case like this, where the co-owner takes the vessel, ~~not in his right~~, as co-owner for the purpose of using his own, but under an agreement with the other owners whereby he becomes the charterer, lessee or bailee of the vessel, and thus bound to some duty of care and fidelity. There can, however, be no question that that case was incorrectly decided, and the rule laid down therein is not consonant with reason or justice. I cannot find that it has ever been followed as authority in any subsequent case and it is in conflict with many authorities. *Sheldon v. Skinner*, 4 Wend. 529; *Chesley v. Thompson*, 3 N. H. 9; *Herrin v. Eaton*, 18 Me. 193; *Martin v. Knowllys*, 8 T. R. 145; *Gillot v. Dossat*, 4 Martin (La.), 203; Domat's Civ. Law, § 1489; 1 Parsons on Maritime Law, 95; Ford's Law of Merchant Shipping, 35, 45; Cooley on Torts, 382, 659.

The Sheldon was loaded with ice and started from the coast of Maine for a southern port. She soon encountered storms, and the defendant for more than two days was constantly on duty, and then becoming exhausted, he went to his cabin, leaving the vessel in charge of the mate and crew. He took a large dose of quinine and laid down. The mate found that the rudder was broken and useless, and that the vessel could not be steered. He caused the captain to come on deck. He refused to believe that the vessel was in any trouble, and refused the help of two tugs, the masters of which saw the difficulty under which his vessel was laboring, and successively offered to take her in tow. They cautioned him that his vessel was gradually and certainly drifting upon the shore; and in broad daylight she did drift upon the shore without any effort upon the part of the defendant or any of his crew to save her, and she became a total wreck. Parsons and Loud had insured their interest in the Phoenix Insurance Company, and it paid them the loss. It thus became subrogated to their claim, if any, against the defendant for his negligence or misconduct in the management of the vessel, and it assigned that claim to the plaintiff. He, standing in the shoes of Parsons and Loud, brought this action against the defendant to recover damages for the loss of the vessel, alleging that it was due to his carelessness and misconduct.

The defendant claims that from the time he went to his cabin, leaving the vessel in charge of his mate and crew, to the time the vessel was wrecked, and he found himself in the life-saving station, he was unconscious and knew nothing of what occurred—that in fact he was from some cause insane, and, therefore, not responsible for the loss of the vessel. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel, but if insane was not responsible for her loss through any conduct on his part which in a sane person would have constituted such negligence as would have imposed responsibility.

The important question for us to determine then is whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice, and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tortfeasors may not simulate or pretend insanity to defend their wrongful acts causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others.

In Buswell on Insanity (sec. 355) it is said: "Since in a civil action for a tort it is not necessary to aver or prove any wrongful intent on the part of the defendant, it is a rule of the common law that although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit."

In Cooley on Torts (98) the learned author says: "A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore, the law in giving redress has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. . . . There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case 'the reason is because he that is damaged ought to be recompensed.'" And at page 100 he says: "Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in

these cases, as well as in others, is a question of policy and, it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose."

In *Shearman and Redfield on Negligence* (sec. 57) it is said: "Infants and persons of unsound mind are liable for injuries caused by their tortious negligence; and, so far as their responsibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary, because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property without compensation."

In *Reeves' Domestic Relations* (386) it is said: "Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries, with force, the intention is not regarded; for in such case a lunatic is as liable to compensate in damages as a man in his right mind."

The doctrine of these authorities is illustrated in many interesting cases. *Bullock v. Babcock*, 3 Wend. 391; *Hartfield v. Roper*, 21 id. 615; *Krom v. Schoonmaker*, 3 Barb. 647; *Conklin v. Thompson*, 29 id. 218; *Cross v. Kent*, 32 Md. 581; *Neal v. Gillett*, 23 Conn. 437; *Huchting v. Engel*, 17 Wis. 230; *Brown v. Howe*, 9 Gray, 84; *Morain v. Devlin*, 132 Mass. 87; *Beales v. See*, 10 Penn. St. 56; *Humphrey v. Douglass*, 10 Vt. 71; *Morse v. Crawford*, 17 id. 499; *Cross v. Andrews*, Crooke, Elizabeth, 622; *Jennings v. Randall*, 8 T. R. 336.

In *Bullock v. Babcock*, Judge MARCY, writing in a case where an infant twelve years old was held liable for putting out one of the eyes of another infant, said: "The liability to answer in damages for trespass does not depend upon the mind or capacity of the actor; for idiots and lunatics are responsible in the action of trespass for injuries inflicted by them."

In *Krom v. Schoonmaker* it was held that a lunatic may be sued for an injury done to another, because the intent with which the act was done is not material. There the action was against a justice of the peace for false imprisonment for issuing a warrant without any complaint, by virtue of which the plaintiff was arrested.

In *Cross v. Kent* it was held that a lunatic or insane person, though not punishable criminally, is liable to a civil action for any tort he may

commit; that in an action against a party for setting fire to and burning a barn, neither evidence of his lunacy, nor that the burning was the result of accident, is admissible in mitigation of compensatory damages.

In *Neal v. Gillett*, in an action on the case for damages caused by the negligence of the defendants, who were severally of the ages of thirteen and sixteen at the time of the injury, it was held that where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration in determining the question of their negligence.

In *Huchting v. Engel* it was held that an infant, though under seven years of age, was liable in an action of trespass for breaking and entering the plaintiff's premises and breaking down and destroying his shrubbery and flowers.

In *Karow v. The Continental Insurance Company* it is said in the opinion: "While the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice GIBSON, 'on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.'"

In *Brown v. Howe* an insane person carelessly set fire to the dwelling house of his guardian, and while it was held that the guardian could not be allowed the amount of his damages in his probate account, it was held that his only course was to sue the administrator of the lunatic who had died, in a court of law, and have a judgment fixing his damages, and collect it from the assets, if the estate was solvent; if not, to share with the other creditors.

In *Morain v. Devlin* it was held that a lunatic was civilly liable for an injury caused by the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which he is the owner, and of which his guardian has the care and management.

In *Beales v. See* it was said by GIBSON, C. J.: "As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it."

In *Morse v. Crawford*, in an action for tort, it was held that the fact that the defendant was insane at the time of committing the injury was no defense to the action, and that if the action be for destroying property intrusted to the defendant, it is no defense that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. In the opinion of the court it is said: "It is a common principle that a

lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake or without design. Consequently no reason can be assigned why a lunatic should not be held liable."

In *Jennings v. Randall* Lord Chief Justice Kenyon said: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." LAWRENCE, J., also writing in that case, mentioned the distinction between negligence and an act done by an infant; and he held that the same rule would have to be applied if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, as would be applied if the declaration charged the infant with having given the cattle bad food by which they died.

There can be no distinction as to the liability of infants and lunatics, between torts of non-feasance and of misfeasance—between acts of pure negligence and acts of trespass. The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction. That infants and lunatics are liable for damage to property caused by their negligent acts, was asserted in several of the authorities above cited; and it has never been doubted that at common law an action of trover would lie against one intrusted with the personal property of another who destroys it, whether the destruction be by a negligent act or a wilful tort.

I sum up the result of my examination of the authorities as follows: This vessel was intrusted to the defendant—not as agent—but as to the other owners as charterer, lessee or bailee, and if he caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible. The misfortune must fall upon him and not upon the other owners of the vessel.

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that this want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion.

If it could be held that the obligation of the defendant to take due care of the vessel while she was in his possession, under his contract

with the other owners, was an obligation springing out of his contract, and thus a contract obligation, such a view of the case would not aid him. He was sane when he entered into the contract, and his subsequent insanity would furnish no defense to an action for a breach of the contract. *Oakley v. Mortin*, 11 N. Y. 625; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 id. 487; *Evans v. United States Life Insurance Co.*, 64 id. 304; *Spalding v. Rosa*, 71 id. 40.

If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness. They did nothing whatever to save the vessel. They did not even expostulate with him or tender him any advice or a word of caution, and yet the mate saw what the captains of the tugs saw at a distance, that something was the matter with him. It is difficult to perceive how they could have failed to see that he was either incompetent to manage the vessel, or that he was wilfully wrecking her. We leave the effect of their conduct upon the defendant's liability to be determined, if it should become necessary, upon the new trial, simply saying that the question is worthy of careful consideration, whether the defendant can allege his own incompetency, and at the same time claim that for any reason the mate ought not to have taken control of the vessel.

The case of *Hays v. Phenix Insurance Co.*, 25 J. & S. 199, aff. 127 N. Y. 656, which seems to have controlled the decision below, is not an authority for the defendant. There he brought an action against the insurance company to recover the amount of his insurance upon this vessel, and his mere carelessness, whether sane or insane, was no defense to such an action. It is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that its destruction was caused by the carelessness of his agents and servants. The liability of the insured to respond in damages for the loss or destruction of the property of another owner stands upon different principles. *Liverpool S. Co. v. Phœnix Insurance Co.*, 129 U. S. 438; *Karow v. Continental Insurance Co.*, 57 Wis. 56.

Since writing the above, suggestions have been made by some of my brethren which should receive some attention.

The fact that the defendant was a part owner of the vessel can play no part in this discussion. He did not take the vessel as part owner, but under the contract with the other owners; and as to them, his duties and obligations were such as spring from the relation created by that

contract. Further, he was the minority part owner, and the others were the majority part owners, and, as such, had the right and the power to control the vessel against his will. *Ward v. Ruckman*, 36 N. Y. 36; *Gould v. Stanton*, 16 Conn. 12; *The William Bagaley*, 5 Wall. 406; *McLochlin's Merchant Shipping*, 89. In *Ward v. Ruckman* it was held that the majority owners of a vessel have the right to displace the master at their pleasure, though he be in possession as part owner. In making their contract with the defendant, the other part owners were exercising their right as the majority part owners. *Non constat*, but that they would, except for the contract, have displaced the defendant and appointed some other person master of the vessel. Therefore, as I have before said, he must be treated as the charterer, lessee or bailee of the vessel.

I quite agree, and no one in this case has contended for more, that the defendant was bound, in the navigation and use of the vessel, to bestow only ordinary care, to wit: Such care as a reasonably careful and prudent owner would ordinarily give to his own vessel. Such is the standard of care set up for all bailees of personal property for hire. But what is that standard? It is not such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impotent could give. Such a man is not the jural man of ordinary prudence, and he does not furnish the standard. The standard man is no individual man, but an abstract or ideal man of ordinary mental and physical capacity and ordinary prudence. The particular man whose duty of care is to be measured does not furnish the standard. He may fall below it in capacity and prudence, yet the law takes no account of that, but requires that he should come up to the standard and his duty be measured thereby.

So when we have defined, as above, the duty of care resting upon the defendant, we have made no progress in the solution of the question here involved, for it is conceded that he took no care whatever. It is sought, however, to excuse him because he was insane and incapable of care; and the question, and, in the end, the sole question for us to determine, is whether that excuse is a good one; and I have heard no argument to sustain it. It is unquestioned that an insane person is civilly liable for his active torts; and is there then any reason for saying that he is not liable for his negligent torts? To uphold this judgment, we must engraft upon the general rule the exception or qualification that he is not liable for his negligent torts. If the defendant had taken a torch and fired the vessel, he would have been liable for her destruction, although his act was unconscious and accompanied by no free will. But if he had negligently fired the vessel and thus destroyed her, being incapable from his mental infirmity from exercising any care, the claim must be that he would not be liable. Such a distinction is not hinted

at in any authority, has no foundation whatever in principle or reason, and cannot stand with authorities I have before cited.

My conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except PECKHAM, GRAY and O'BRIEN, JJ., dissenting.

*Judgment reversed.*¹

MARRIED WOMEN.

FITZGERALD V. QUANN.

(33 Hun, 652.—1884.)

APPEAL from an order at Circuit, setting aside a verdict in favor of the plaintiff and dismissing the complaint as to the defendant husband, and from the judgment entered thereon, in an action brought against husband and wife jointly to recover damages for slanderous words alleged to have been uttered by the wife.

BRADLEY, P. J. The question presented is whether the husband may or may not properly be joined as a defendant with his wife in an action for the tort of the latter, having no relation to her separate property. This depends upon the interpretation given to section 450 of the Code of Civil Procedure, which provides that "in an action or special proceeding a married woman appears, prosecutes or defends, alone or joined

¹ At the second trial of this action, judgment in favor of the plaintiff, entered upon the direction of a verdict, was affirmed by the Appellate Division of the Supreme Court, but, on appeal to the Court of Appeals, the judgment was again reversed and a new trial granted. In its opinion, per Haight, J., the court said: "This action was considered in this court on a former review (143 N. Y. 442), at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel, and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and non-feasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant 'caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible.' The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act we will not now stop to consider." *Williams v. Hays*, 157 N. Y. 541, 546.

with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property." The learned justice at Special Term in support of his conclusion sought the reason of the rule which at common law made the husband a necessary party defendant with the wife in actions for her torts, and held that the reason having ceased, the legislative intent fairly derived from that section and consummated by it was to require, that the wife for the purposes of all actions to which she may be a party be treated as a *feme sole*.

It has not been the policy in this State for courts to move any in advance of the clearly expressed legislative purpose to remove the common law disabilities, rights or liabilities of coverture, or to modify the marital relations (*Tait v. Culbertson*, 57 Barb. 9; *Bertles v. Nunan*, 92 N. Y. 152), while in some of the States the courts have determined that the reason for the common-law rule relating to the marriage relation in certain respects had been removed by statute, and therefore the rule itself had ceased to exist although the legislature had not by any act in terms abrogated it. And notably in Illinois it was held that the effect of the statute giving the wife the right to acquire, own, control and dispose of property, etc., free from any interference of her husband, was to relieve him from liability to be joined as a defendant with her in actions for her personal torts. (*Martin v. Robson*, 65 Ill. 129; 16 Am. R. 578.)

At common law the husband and wife were treated as one person and as having but one will between them, and that in the husband. By the marriage the wife was deemed to surrender to him absolute power of disposition of her personal property, and to collect her choses in action and appropriate to his own use the proceeds, and only such of them as he did not collect were retained by her if she survived him. She could not, at law, make any contract or alone be a party to an action, nor in any manner, except through her husband, defend one in which she was joined as defendant. Of this he had entire control; yet she, as well as he, was charged in execution issued on the judgment recovered. (*McKinstry v. Davis*, 3 Cow. 339.) In all actions for debts owing to and by the wife *dum sola*, and for torts committed by and against her before and during coverture, brought while the marriage relation continued, the husband and wife had to be joined as plaintiffs or defendants; and in all those cases if the husband died before judgment, leaving the wife, the actions survived to her; but if she died leaving him surviving they abated (except that he might, as administrator, continue actions, so brought by him and wife to recover such debts.) (*Checchi v. Powell*, 6 Barn. & Cress. 253; *Gage v. Reed*, 15 Wend. 361; *Goulding v. Davidson*, 26 N. Y. 606; *Ball v. Bullard*, 52 Barb. 141, 143, 144.) And the same rule would apply to rights of action not com-

menced for such causes. But if judgment was recovered against husband and wife in any such action his liability to pay it was fixed, and his estate was charged after his death with its payment. (*Heard v. Stamford*, 3 P. Wms. 409, 411; *Cole v. Shurtleff*, 41 Vt. 311; *Burton v. Burton*, 5 Harring. 441.) And he was without relief in equity. (*Heard v. Stamford*, *supra*.) This liability of the husband continued only during coverture. (*Head v. Briscoe*, 5 C. & P. 484.)

This was the general situation at law before the first of the series of statutes known as the married women acts was passed in this State. Those of 1848 and 1849 removed the disability of married women so far as to enable them to acquire, own and dispose of property the same as if unmarried, but as incident to that right she could not alone sue at law (*Morgan v. Andrut*, 18 How. 371), until section 114 of the Code of Procedure was given by the amendment of 1849. Then followed the acts of 1860 and 1862 which enlarged their property rights, enabled them to carry on business, appropriate the proceeds of their services, etc., to sue and be sued in all matters relating to their separate property, and to sue for injuries to their person or character the same as if they were single. And although for all torts relating to her property she could sue and be sued alone (*Rowe v. Smith*, 55 Barb. 417; affirmed, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577), and for personal wrongs committed against her she could sue alone (*Ball v. Bullard*, 52 Barb. 141), yet she could not be sued alone for any personal tort committed by her, but the common law in that respect still remained in force without the aid of the restrictive clause of section 114 of Code of Procedure. (*Tait v. Culbertson*, 57 Barb. 9.) The purpose of that section was only to remove disability, and beyond that it was merely declaratory of the common law and did not restrict its operation. But it is said that the husband was joined as defendant with the wife as matter of necessity merely (which involves to some extent the reason for the common law doctrine which required it), and that both the necessity and the reason are gone, and by the force of section 450 of Code of Civil Procedure he cannot be so joined. When the reason upon which a rule of law is founded is clearly defined and is removed the rule itself disappears. (Brown's Legal Maxims (5th ed.), 133, marg. 118; *Berley v. Rampacher*, 5 Duer, 186.) But the maxim *cessante ratione legis cessat ipsa lex* cannot be applied to the common-law rule which required the husband to be joined with the wife as defendant in such case. If it might be deemed an arbitrary one, the inquiry into the reason of it involves the consideration of all the rights, obligations, duties, liabilities and disabilities given by the common law to the marital relation. And so far as observed, no writer has yet authentically furnished satisfactorily all the reasons which may have influenced the various conditions of coverture imposed by the common law. It cannot be said that

the reasons have ceased to exist in the sense which is required to enable the courts to declare that the rule does not remain. (*Brown v. Clark*, 77 N. Y. 369.)

While the common law is not so rigid a system as to wholly disregard changed circumstances of society, and has sufficient elasticity to develop new principles to meet new cases, the courts do not assume to abrogate a well settled principle of it. And whether reasons exist for a change or modification of the common law in any particular is a question peculiarly for the legislature. To justify the conclusions that the provisions of sections 450 of the Code of Civil Procedure either permit a married woman to be sued alone, or require that the husband should not be joined with her in an action like this, that statute must, by fair interpretation of its terms, be sufficient to so permit or require. This the language does not necessarily do if there is any substantial difference in effect between appearing and defending alone, and being sued alone. By the learned opinion at Special Term it appears that the position taken was that there was no liability of the husband in such case. If that is entirely correct, then if the terms of the statute permitted it, it would in effect also require that the wife be a sole defendant, for in such case the right would not survive the necessity to join him. The contention of the defendant's counsel is that the purpose of this section was to sweep away completely the common-law rule requiring the husband to be joined; that the husband, by that rule, was in no sense liable for the personal torts of the wife, and that he was joined by mere necessity occasioned by disability of the wife, and reference is made to *Capel v. Powell*, 17 C. B. [N. S.] 743, decided in 1864, where an action was brought after dissolution of marriage against those who had been husband and wife for a personal tort committed by the latter during coverture. The court held that the action could not be maintained against him; that his liability to be sued in such cases continued only during coverture, and ERLE, C. J., in his opinion, said: "Where the husband is joined for conformity, if he dies the action goes on against the wife, but if the wife dies the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong, but is joined only by reason of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant."

There is no occasion to criticise the decision of the court of Common Pleas made in that case nor the opinion of the chief judge so far as related to the necessity of the existence of coverture to permit the husband to be joined, and to the matter of survivorship. They are well established propositions but further than that it perhaps was not necessary for him to go for the purposes of that case. (See cases above cited and *Head v. Briscoe*, 5 C. & P. 484; *Wright v. Leonard*,

11 C. B. [N. S.], 265, 266; *Rowing v. Manley*, 49 N. Y. 201.) Although the personal tort of the wife is not that of the husband and no imputation for the wrong is against him, the ground upon which his liability to be joined with her as defendant was placed is not very clearly defined. Judge KENT says that the husband is liable for the torts of the wife (2 Kent's Com. 149), and such is generally the expression given by text and judicial writers on the subject. Mr. Bishop, in his work "On the law of Married Women," says, that to say he is liable for her torts is an inaccurate statement; that the liability is that of the wife, not his, and that he is joined because the suit cannot be maintained against the wife alone. (Vol. 2, § 254; see also Cooley on Torts, 115.) Bacon states it, that the husband is "answerable for all her torts and trespasses during coverture, in which cases the action must be joint against them both." (Bac. Abr. Baron & Feme, L.) The fact that "the husband and the wife are one person in law, and her legal existence suspended during the marriage" (1 Bl. 442) may have been a reason of his liability such as it is. As has been already observed, precisely the same character of liability during the marriage relation existed of the husband for debts contracted by the wife *dum sola* as for her personal torts. It rested on the same doctrine and the effect of survivorship the same. His relation to those debts at common law, and as bearing upon the question under consideration, may perhaps be somewhat illustrated by authority.

In *Miles v. Williams* (1 P. Wms. 249, 257), it was held that the discharge of the husband in bankruptcy during coverture discharged the debts of the wife contracted by her before marriage. The bankrupt act, under which he was discharged, provided that "the bankrupt shall be discharged from all debts *by him due and owing* at the time he became bankrupt." In *Lockwood v. Salter* (5 Barn. & Adol. 303), decided in 1833, the same was held (S. C. 2 Nev. & M. 255; see Bright on Husband and Wife, 3); but in *Sparks v. Bell* (8 Barn. & Cress. 1; S. C. 2 Man. & Ry. 124), decided in 1828, it was held that after judgment against husband and wife, recovered on an ante-nuptial debt of the latter, the discharge of the husband under the insolvent act did not entitle the wife, taken in execution with him, to be discharged from custody unless it appeared that she had no separate property, and the court there said "the debt in question was originally the debt of the wife, by the marriage it became the debt of the husband and wife."

In *Vanderheyden v. Mallory*, 1 N. Y. 452, reversing 3 Barb. Ch. 9, it was held that the discharge of the husband under the general bankrupt act of 1841 discharged during coverture the debt of his wife contracted before the marriage. The provision of that act was that the bankrupt shall be entitled to full discharge from all *his* debts. That suit was brought in chancery to reach some separate property of the

wife. The court held that it could not be maintained and dismissed the bill. It is difficult to reconcile the theory expressed by the *dictum* of the chief judge in *Capel v. Powell*, that the husband is not liable, with the doctrine and consequences applied as appears by adjudications. The solution of the situation seems to be that by the common law the husband during coverture was liable for the torts and ante-nuptial debts of the wife. That such liability did not necessarily rest on him as debtor, nor did it impute to him any personal wrong on his part, but his liability was as husband and because he was such; and it is not important that such liability was arbitrarily imposed by law, and continued only during coverture, and that it afforded no vested right before judgment against him to recover, after dissolution in any manner of the marriage relation.

That it was nothing short of such liability, and more than a mere necessity to join him as party, is evidenced by the fact that when in such a case a judgment is recovered against him, he and his estate after his death are chargeable with its payment, and without any relief as against the separate estate of the wife; also that his discharge in bankruptcy bars action during coverture. The tort is personal to the wife only; the right of action for it abates with her death, and survives against her alone on the death of her husband or other termination of coverture. The right of the person aggrieved by her tort was at common law to prosecute to judgment the husband while he remained such, and to collect of him the judgment. It is difficult by any qualification to treat that less than a right while the rule of the common law remains. *Hill v. Duncan*, 110 Mass. 238, 239. The statute in question (Code Civil Pro., § 450), does not provide either that the husband may not be joined as defendant with the wife or that she may be sued alone. The amendment or annex of 1879 to this section does not restrict the import of the original section, nor does it by relation or implication entitle it to any new or different meaning. While all statutes on this subject are *in pari materia* and to be treated as one, in aid of the interpretation of each, they are not as a whole exceptions to the rule which requires that those in derogation of the common law are to be construed as innovations on it, no further than they by express terms or by fair implication declare. *Perkins v. Perkins*, 62 Barb. 531. The common law unity of husband and wife and disabilities by coverture still exist in many respects in this State, and in all respects except so far as the legislative purpose to modify and remove them has been expressed by statute. (*Bertles v. Nunan*, 92 N. Y. 152.)

In the provision of the section that "a married woman appears or defends alone," etc., a purpose may be seen to remove her disability, when the husband is joined with her as defendant, to control the defense in her own behalf, which she could not do at common law; although

in a proper case she might go into equity where severalty of husband and wife was recognized and obtain leave to defend. This section (450) gives her the right to do so at law without the aid of a court of equity. (*Janinski v. Heidelberg*, 21 Hun, 439.) The interpretation of that section has had consideration in some other cases. In *Hoffman v. Lachman*, the Special Term of New York Marine Court; in *Berrien v. Steel*, the Special Term in First Department (1 N. Y. Civ. Pro. R., 278, 279 notes); in *Fitzsimmons v. Harrington* (id. 360), the Genesee Special Term, and in *Trebing v. Vetter* (2 McCarthy Civ. Pro. R. 391). The General Term of Brooklyn in City Court held that the common law rule in question was not removed by the Code of Civil Procedure (§ 450). In *Muser v. Miller* (65 How. 283; 3 N. Y. Civ. Pro. R. 388), the Special Term of the New York Superior Court, on a motion to vacate an order of arrest, FREEDMAN, J., held that the common-law rule in that respect was abrogated by operation of that section, and approved the decision and opinion of the Special Term in the case at bar. And the Oneida Special Term in *Lande v. Smith* (6 N. Y. Civ. Pro. R. 51), did the same. But *Muser v. Miller* has since been overruled in that respect by the General Term of the same court in *Muser v. Lewis* (18 Jones & Spencer, 431, and 14 Abbot's N. C. 333), and SEDGWICK, C. J., in delivering the opinion, held that the husband was properly joined as defendant, and that the provisions of the first part of section 450 had no relation to the way in which the wife might be sued, but merely relieved her from the common-law disability of defense where her husband was joined with her as defendant, and permitted her to appear and defend *sui juris* as if she were unmarried.

No legislative intent is found in that section to require that a married woman may be made a sole defendant in an action like this. The statute of Massachusetts (St. 1871, chap. 312), under which the decisions there are made, completely abrogates this common-law rule. (*Hill v. Duncan*, 110 Mass. 238; 118 id. 58.)

From the views above given the conclusion follows that the judgment and order appealed from should be reversed.

Present—SMITH, P. J., BARKER and HAIGHT, JJ.

*Judgment and order reversed.*¹

¹ Affirmed in 109 N. Y. 441.

ABBOTT V. ABBOTT.

(67 Maine, 304.—1877.)

PETERS, J. The defendants forcibly carried the plaintiff to an insane asylum. The case assumes the act to have been wrongful and wanton. The plaintiff and one of the defendants, at the time, were husband and wife; since then she was divorced. Can an action of tort, for such an injury, instituted after divorce, be sustained by her against her former husband?¹ We have no doubt, that it cannot be maintained.

Precisely the same question was lately before the English court, and the decision and the reasons on which the decision is grounded meet with our unqualified approval. *Phillips v. Barnet*, 1 Q. B. D. 436. It is there held that a wife, after being divorced from her husband, cannot sue him for an assault committed upon her during coverture. In the course of the discussion in that case, LUSH, J., says: "Now I cannot for a moment think that a divorce makes a marriage void *ab initio*; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case;" FIELD, J., says: "I now think

¹ "Section 27 of the Domestic Relations Law (N. Y. Laws of 1896, ch. 272) provides that 'A married woman has a right of action for an injury to her person, property or character, or for an injury arising out of the marital relation, as if unmarried.' At first glance this provision may seem broad enough to permit a wife to sue her husband in an action for damages for personal injuries. To say that her rights in such cases are coextensive with the rights of unmarried women, is not to say that her rights, in cases of personal injury, include actions against her husband, because the rule of unity can in no wise enter in the case of unmarried women, and the husband's common-law *right of exemption* is a factor to be considered. . . .

"The fact that personal injuries are grouped with injuries to the wife's property cannot justify the conclusion that her rights, in cases of personal injuries, are as broad and inclusive as are her rights in cases of injuries to her property. The powers and rights of a married woman, in respect to her property, are very particularly set forth in section 21 of the Domestic Relations Law, and the intention of the Legislature to abrogate the rule of unity in such cases is clear and unmistakable: 'A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, *including her husband*, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried.' The Legislature evidently concluded that the expression *any person* was not broad enough to include the husband." (Author's article on Assault and Battery, III. *University Law Review*, 108; see also *id.* 67.)

The case of *Abbe v. Abbe* (25 App. Div. 483), decided since the passage of the above law, denies the wife the right to sue her husband for personal injuries.

it clear that the real substantial ground why the wife cannot sue her husband is not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person;" and BLACKBURN, J., states the objection to be "not the technical one of parties, but because, being one person, one cannot sue the other."

The theory upon which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against her husband. But the error in the proposition is the supposition that a cause of action or a right of action ever exists in such a case. There is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.

The doctrine advocated by the plaintiff finds no support from any of the principles of the common law. According to the oldest authorities, the being of the wife became, by marriage, merged in the being of the husband. Her disabilities were about complete. By the earliest edicts of courts, he had a right to strike her as a punishment for her misconduct, and her only remedy was, that "she hath retaliation to beat him again if she dare." And Chancellor KENT lays down the doctrine, not contradicted or challenged in any of the editions of his commentaries, that, "as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce." 2 Kent, Com. 180. But there has been for many years a gradual evolution of the law going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American states that the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever. See, upon this subject, the cases collected in a learned and instructive note to the case of *Commonwealth v. Barry*, in 2 Green's Cr. L. Reports, 286. Still, the state of the old common law serves to show the basis upon which the marriage relation subsisted; and we do not perceive that there has been, either by legislative enactment or by the growth of the law in adapting itself to the present condition of society, any change in that relation which can afford the plaintiff a remedy. So to speak, marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon

the other. As said by SETTLE, J., in *State v. Oliver*, 70 N. C. 60: "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of *habeas corpus*, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way, all matters would be settled in one suit as a finality.

It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assault, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for lawsuits and speculations, to be wise and salutary and to stand on the solid foundations of the law.

The plaintiff invokes the case of *Blake v. Blake*, 64 Maine, 177, as supporting her right to sue. That was a suit in assumpsit. In matters of contract there may be a cause of action during coverture, not enforceable by the ordinary methods until afterwards. The common law has been so far abrogated by the force of various legislative acts as to allow contracts to be made by husband and wife with each other. And, to a certain extent, contracts between man and wife always were upheld in courts of chancery. That case, therefore, differs from this.

Then, if the husband is not liable, the question arises whether the co-defendants are liable in this action. We think it follows from the previous reasoning that they are not. The true test as to their liability is, whether an action could have been maintained against them at the time of the act complained of. It is clear that no action was then maintainable. If the co-defendants had been then sued, the action must

have been in the name of the husband and wife, and the husband would have sued to recover damages for an injury actually committed by himself. Husband and wife must declare that the injury was *ad damnum ipsorum*. She cannot, at common law, sue in her own name alone, nor in his without his consent. She cannot appoint an attorney, ordinarily, but he must do it for her. His conduct and admissions can affect the suit. He can release the cause of action and she cannot. She could do no act to redress an injury to her without his concurrence. Nor has the common law been changed in any of these respects until 1876; which was after this action was commenced. Laws of 1876, c. 112. The damages recoverable in an action would have belonged to him and not to her. And, at the same time, if she had committed a tort, he would have been civilly liable for it. It is very certain, therefore, that no action could ever have been sustained against them in his name. They merely aided and assisted him. But if there was no injury to him there was none to her. They were one. Without doubt, after the death of the husband, a wife may maintain an action in her own name for a wrong committed upon her while her husband was alive, if no action was instituted nor the cause of action released during his lifetime; and undoubtedly the same right follows after a divorce *a vinculo matrimonii*. But she can only recover for such a wrong as she and her husband could have recovered for in their joint names while the marriage relation subsisted. She succeeds after death or divorce to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive. Here there was none. A thing cannot continue after an event which does not exist before. It would not be the survival of a claim, but would be one newly created. *Norcross v. Stuart*, 50 Maine, 87; *Marshall v. Oatkes*, 50 id. 308; *Ballard v. Bussell*, 33 id. 196; *Laughlin v. Eaton*, 54 id. 156; *West v. Jordon*, 62 id. 484; *Hasbrouck v. Weaver*, 10 Johns. 247; *Snyder v. Sponable*, 1 Hill (N. Y.), 567; *Bacon Ab., Baron and Feme*, K.; *Shaddock v. Clifton*, 22 Wis. 114.

Plaintiff nonsuit.

APPLETON, C. J., WALTON, DICKERSON and VIRGIN, JJ., concurred.
BARROWS, J., concurred in the result.

CORPORATIONS: IN GENERAL.¹**GOODSPEED V. THE EAST HADDAM BANK.**

(22 Connecticut, 530.—1853.)

ACTION on the case, for a vexatious suit, against the defendant, a corporation.

CHURCH, C. J. This action is based upon the provisions of our statute, entitled, "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case, for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff,

¹ The old idea that a corporation, being an artificial person created by the sovereign, and endowed with certain powers, and none other, could not commit an actionable tort, has long since been abandoned. To-day, a corporation is liable for its wrongful acts to the same extent and under the same circumstances as a natural person. Actions for libel (*Samuels v. Evening Mail Association*, 75 N. Y. 604; *Fogg v. Boston & L. R. Co.*, 148 Mass. 513; *Evening Journal Association v. McDermott*, 44 N. J. L. 430; *Hewett v. Pioneer Press Co.*, 23 Minn. 178; *Ætna Life Ins. Co. v. Paul*, 37 Ill. App. 439); for conversion (*Fishkill Savings Inst. v. Bostwick*, 19 Hun, 354); for conspiracy (*Morton v. Met. Life Ins. Co.*, 34 Hun, 366; *Krulevitz v. Eastern R. Co.*, 140 Mass. 575); for assault and battery (*Denver & R. G. R. v. Harris*, 122 U. S. 597; *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117); for false imprisonment (*Lynch v. Met. El. R. Co.*, 90 N. Y. 77); for deceit (*Cragie v. Hadley*, 99 N. Y. 131; *Kennedy v. McKay*, 43 N. J. L. 288); and for malicious prosecution (*Morton v. Met. Life Ins. Co.*, 34 Hun, 366; *Reed v. Home Savings Bank*, 130 Mass. 443; *Nat. Bank v. Graham*, 100 U. S. 699) have been successfully prosecuted against corporations. This is as it should be. The liability of corporations in tort may properly and logically be determined by the application of the law in relation to master and servant. A corporation, as an artificial person, cannot do anything of itself; it must and always does act through officers or agents, who stand to the artificial body as servant to master. As the master, a natural person, is responsible for the tortious acts of his servant committed within the scope of his employment, so is the corporation, an artificial person, responsible for the tortious acts of its servants committed within the scope of their employment. A remnant of the antiquated conception of the responsibility of corporations for torts seems still to survive so far as actions for slander are concerned. In *Eichner v. Bowery Bank*, 24 App. Div. 63, it was held that a corporation was not liable for slander, because "the corporation itself could not talk." (See to same effect *Odgers on Libel and Slander*, p. 368; *Townshend on Slander and Libel*, § 265.) Such conclusion, however, is not consonant with the modern conception of corporations, and rests too literally upon the idea that a corporation is an ideal person. A proper application of the law relating to master and servant would avoid such misconception. See editorial page of N. Y. Law Journal of Dec. 17, 1909; L. R. (N. S.), Vol. 21, p. 873.

commenced, by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the superior court, the defendants moved for a nonsuit, on the ground that the plaintiff, by his evidence had failed to make out a *prima facie* case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the superior court, in granting the nonsuit, as we understand, was founded solely upon the ground, that a corporation aggregate was not, by law, liable for such a cause of action as was set up by the plaintiff, in his declaration; at least, no other ground of nonsuit or objection to the plaintiff's action has been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume, that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury, is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted and not against the corporation. We think, that, to turn the plaintiff round, to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private,—that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of TILGHMAN, C. J., in a case very similar to the present, in which it was urged, that a corporation was not liable for a suit, but only the individuals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury, by means of laborers having no property to answer damages," etc. 4 Serg. & Rawle, 16. To the same effect is the language of SHAW, C. J., in the case of *Thayer v. Boston*, 19 Pick. 511. He says, "The court are of opinion, that his argument, if pressed to all its consequences, and made the foundation of an inflexible, practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court, in the case of *The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company*, 7 Wend. 31. There, as here, it was contended, that the act was unau-

thorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says, "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature, as well as the law, of corporations, within the last half century, has been in a progress of development, so that it has grown up, from a few rules and maxims, into a code. In the days of Blackstone, the whole subject of corporations, and the laws affecting them, were discussed within the compass of a few pages; now, volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence, all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this; but we say, that, as new relations, from this cause, are formed and new interests created, legal principles of a practical rather than of a technical or theoretical character must be applied.

And so, in the course of this progress, it has been. It was said by Lord COKE, "that corporations had neither souls nor bodies;" and by somebody else, "that they had no moral sense;" and from thence, or some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs, nor be liable for torts, with a few exceptions, as we shall see.

Had Lord COKE lived in this age and country, he would have seen, that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs; that they act, not only upon pecuniary concerns; but, as having conscience and motives, to an almost unlimited extent, they are entrusted with the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers, regarding the real nature, power and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed, that now, these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered, why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures, for malfeasance, and even to the loss of corporate life, by the revocation of their charters. And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. *Yarborough v. Bank of Eng.*, 16 East, 6; *Beach v. Fulton Bank*, 7 Cowen, 436; *Foster v. Essex Bank*, 17 Mass. 503; *Riddle v. Proprietors of Locks and Canals*, 7 id. 187; *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & Rawle, 16; 4 Hammond, 500, 514; 10 Ohio Rep. 159; *Dater v. Troy Turnpike Co.*, 2 Hill, 630; 23 Pick. 139; 2 Bl. Com. 476; Ang. & Ames, 392; 2 Kent, Com. 290; 1 Sw. Dig. 75; 15 Ohio Rep. 476; 18 id. 229. And indeed, no actions are now more frequent, in our courts, than such as are brought against corporations, for torts, either in case or trespass. *Hooker v. New Haven & Northampton Canal Co.*, 14 Conn. R. 146, and the cases there cited, and many others since reported. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. *Eastern Counties Railway Co. v. Brooks*, 2 Eng. Law. & Equity, 406. And it was decided long ago, that a corporation was liable to an action, for a false return to a writ of *mandamus*, alleged to have been made falsely and *maliciously*. 16 East. 8; 14 Eng. Com. Law, 159; 3 Mees. & Wels. 244; Ang. & Ames, ch. 10, sec. 9.

In all the cases, wherein it has been holden, that corporations may be subjected to civil liabilities for torts, the acts charged as such, have been the acts of their constituted authorities, either the directors, or agents, or servants, employed by them. We do not here intend to discuss or decide the frequently suggested question, how far, or when a principal, whether an individual person, or a corporation, becomes responsible for the wilful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not admit, that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of, as vexatious, was instituted by the bank, in the name of the bank, and, as should be presumed, in just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different procedure than is usual, in actions by corporations. The action was brought, for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank, in its corporate cap-

acity. The bank, by its charter, and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. & Ames, ch. 10, sec. 9. No act of agency appears here, which does not appear in all suits brought by corporations, and nothing to show, that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine, that principals are not responsible for the wilful misconduct of their agents, as seems to have been sanctioned in the cases of *McManus v. Cricket*, 1 East, 106; *Wright v. Wilcox*, 19 Wend. 343; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comstock, 470; but denied by Chief Justice REEVE, in his *Domestic Relations*, 357, we think has never been applied to such a case as this, but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority,—persons whose duty is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation,—the representatives standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of *Burrell v. The Nahant Bank*, 2 Met. 163, SHAW, C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says: "We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform, as to be regarded as part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, *the corporation*. We think they do not exercise a delegated authority, in the sense to which the rule applies to agents and attorneys," etc. The same principle is very distinctly recognized, in the cases of *Bank Commissioners v. Bank of Buffalo*, 6 Paige's Ch. 502, and *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31. It has been said, that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act,—and this is only in the choice of directors, and no more. Beyond this, they can only be considered, as the persons for whose ultimate individual interests the corporation acts. The directors derive all their power and authority from the charter and laws, and none from the stockholders.

But the fear is expressed, that, by thus considering and treating

the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent, be true; but the protection of the law in this matter, is not to be confined to stockholders; the public and strangers have rights also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of the two innocent persons or classes is to suffer, which should it be,—that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort, which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one,—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say, that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its actions; and still to claim, that although the acts were those of the bank, the intention was that only of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution, as a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff cannot, in some legitimate way, prove the malice he has alleged, he cannot recover; but we have no right to assume it as a legal principle, that it cannot be proved. We do not know that it has ever been adjudged, that a corporation is civilly

responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges, is evidence of malice, and which must, as in this case, be proved. But, would it be endured, that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason, than that a corporation is only an ideal something of which malice or intention cannot be predicated? And if, as we have suggested, the directors are, for all practical purposes, *the corporation* itself, acting, at least, as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure, that this objection of the defendants, was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation, felt, when the case of *Merrills v. The Tariff Manufacturing Co.*, 10 Conn. R. 384, was tried at the circuit, and discussed and decided by this court. That was an action against a corporation, for a malicious injury, and the sole question in this court was, whether by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable, in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character, which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion, that the nonsuit granted by the superior court should be set aside, and a new trial granted.

*Nonsuit set aside, and new trial to be granted.*¹

¹ Opinion by Ellsworth, J., omitted.

*(a) STATE.*BIGBY *v.* UNITED STATES.

(188 United States, 400.—1902.)

BIGBY, the plaintiff in error, claimed in his petition to have been damaged to the extent of ten thousand dollars on account of certain personal injuries received by him while entering an elevator placed by the United States in its court-house and post-office building in the city of Brooklyn, and asked judgment for that sum against the Government.

The petition was demurred to upon three grounds, namely, that the court had no jurisdiction of the person of the defendant, or of the subject of the action, and that the petition did not state facts sufficient to constitute a cause of action against the United States.

The demurrer was sustained by the Circuit Court on each of the grounds specified, and so far as it was sustained upon the ground that the petition did not state a cause of action, it was sustained because the action was not authorized by the act of Congress known as the Tucker Act, approved March 3, 1887, c. 359, and entitled "An act to provide for the bringing of suits against the Government of the United States." 24 Stat. 505. The action was accordingly dismissed. 103 Fed. Rep. 597.

The specific allegations of the petition are—

That the United States is a corporation created by the Constitution with its principal office in Washington, and within the meaning of the New York Code of Civil Procedure is a foreign corporation;

That on or about November 27, 1899, the petitioner, while on his way to the office of the Marshal of the United States for the Eastern District of New York, and at the request of the United States, and of its officers, employees and duly authorized agents, each acting within the scope of his authority, entered into a passenger elevator in the United States court-house and post-office building in Brooklyn, which building and elevator was owned and controlled by the United States, and was designed and intended by it for the use of persons on their way to the office of its said Marshal;

That the United States "then and there entered into an implied contract" with the petitioner, "wherein and whereby, for a sufficient valuable consideration, it agreed to carry your petitioner safely, to operate said elevator with due care, and to employ for the purposes of the operation of said elevator a competent and experienced person;"

That in "violation of said contract, the United States failed to

carry the petitioner safely, or to operate the elevator with due care, or to employ for the operation and to put in charge of such elevator a competent and experienced person, and violated its contract with the petitioner in other ways;" and,

That in consequence of said failures, respectively, the petitioner, "while entering the said elevator without negligence on his part was caused to fall and his foot, ankle and leg were crushed between said elevator and the top of the entrance into the elevator shaft or a projection in the shaft of said elevator or in some other manner and the back of your petitioner and other parts of the body of your petitioner were also consequently injured and your petitioner consequently suffered a laceration of the ligaments of his ankle and he consequently was caused much bodily and mental pain."

MR. JUSTICE HARLAN. This being an action against the United States, the authority of the Circuit Court to take cognizance of it depends upon the construction of the above act of March 3, 1887. 24 Stat. 505.

By that act it is provided that the Court of Claims shall have jurisdiction to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: Provided, however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same." The act further provided that "the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case "sounding in tort." But the contention of the plaintiff is, in substance that although the facts constituting the negligence of which he complains, made a case of tort, he may waive the tort; that his present claim is founded

upon an implied contract with the Government, whereby it agreed to carry him safely in its elevator, to operate the elevator with due care, and to employ for the purposes of such carriage a competent and experienced person; and, consequently, that his suit is embraced by the words "upon any contract, express or implied, with the Government of the United States." The contention of the United States is that no such implied contract with the Government arose from the plaintiff's entering or attempting to enter and use the elevator in question, and that the claim is distinctly for damages in a case "sounding in tort," of which the act of Congress did not authorize the Circuit Court to take cognizance.

Can the plaintiff's cause of action be regarded as founded upon implied contract with the Government, within the meaning of the act of 1887?

The precise question thus presented has not been determined by this court. But former decisions may be consulted in order to ascertain whether this suit is embraced by the words, in that act, "upon any contract, express or implied, with the Government of the United States." Do those words include an action against the United States to recover damages for personal injuries caused by the negligent management of an elevator erected and maintained by it in one of its court-house and post-office buildings?

[The court here considered the cases of *Gibbons v. United States*, 8 Wall. 269, *Langford v. United States*, 101 U. S. 341, *Hill v. United States*, 149 U. S. 593, *Robertson v. Sichel*, 127 U. S. 507, *Schillinger v. United States*, 155 U. S. 163.]

It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the Government is not liable to be sued for the torts, misconduct, mis-feasance or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the Government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in *United States v. Russell*, 13 Wall. 623, which was an action to recover for the use of certain steamers used in the business of the Government pursuant to an understanding with the owner that he should be compensated; or, in *United States v. Great Falls Manufacturing Company*, 112 U. S. 645, in which it appeared that certain private property was appropriated by officers of the Government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in *United*

States v. Palmer, 128 U. S. 262, 269, which was an action to recover for the use of a patent which the Government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the Government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the Government would pay for such use.

But, as we have seen, the plaintiff contends that when he entered or attempted to enter the elevator the Government must be deemed to have contracted that its employee in charge of it would use due care so as not to needlessly injure him. In other words—for it comes to that—by the mere construction and maintenance of such elevator the Government, contrary to its established policy, impliedly agreed to be responsible for the torts of an employee having charge of the elevator, if, by his negligence, injury came to one using it. We find no authority for this position in any act of Congress, and nothing short of an act of Congress can make the United States responsible for a personal injury done to the citizen by one of its employees who, while discharging his duties, fails to exercise such care and diligence as a proper regard to the rights of others required. “Causing harm by negligence is a tort.” One of the definitions of a tort is “an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented.” Pollock on Torts, 1, 19. The elevator in question was erected in order to facilitate the transaction of the public business, and also, it may be assumed, for the convenience and comfort of those who might choose to use it when going to a room in the court-house and post-office occupied by public officers, and not pursuant to any agreement, express or implied, between the United States and the general public, or under any agreement between the United States and the individual person who might seek to use it. No one was compelled or required to use it, and no officer in charge of the building had any authority to say that a person using it could sue the Government if he was injured by reason of the want of due care on the part of the employee operating it. No officer had authority to make an express contract to that effect and no contract of that kind could be implied merely from the Government’s ownership of the elevator and from the negligence of its employee. The facts alleged show a case in which the plaintiff was injured by reason of the negligence of the manager of the elevator. It is therefore a case of pure tort on the part of such manager for which he could be sued. It is a case “sounding in tort,” because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the Government; for,

as we have said, no one was authorized to put upon the Government a liability for damages arising from the wrongful, tortious act of its employee. The plaintiff therefore cannot by the device of waiving the tort committed by the elevator operator make a case against the Government of implied contract. A party may in some cases waive a tort, that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that "a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort, does not imply a promise to pay them, upon which assumpsit can be maintained." *Cooper v. Cooper*, 147 Mass. 370, 373. If the plaintiff could sue the elevator employee upon an implied contract that due care should be observed by him in managing the elevator, it does not follow that he could sue the Government upon implied contract. For under existing legislation no relation of contract could rise between the Government and those who chose to use its elevator. It is easy to perceive how disastrous to the operations of the Government would be a rule under which it could be sued for torts committed by its agents and employees in the management of its property. It is for Congress to determine in all such cases what justice requires upon the part of the Government. If any exceptions ought to be made to the general rule it is for Congress to make them.

We have not overlooked the allegation in the petition that the plaintiff entered the elevator "at the request of the United States, and of its officers, employees and duly authorized agents, each acting within the scope of his authority." This, we assume, means at most only that the plaintiff entered, or attempted to enter, the elevator with the assent of those who had control of it and of the building in which it was erected. But if more than this was meant to be alleged; if the plaintiff intended to allege an express or affirmative request by officers or agents of the United States, the case would not, in our view, be changed; for the court knows that, without the authority of an act of Congress, no officer or agent of the United States could in writing or verbally, make the Government liable to suit by reason of the want of due care on the part of those having charge of an elevator in a public building.

We are of opinion that this case is one sounding in tort, within the meaning of the act of 1887, and therefore not maintainable in any court.

The judgment of the Circuit Court dismissing the action for want of jurisdiction is

Affirmed.

(b) MUNICIPAL.¹**MAXMILIAN V. THE MAYOR, ETC.**

(62 New York, 160.—1875.)

APPEAL by the plaintiff from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the defendants entered upon an order dismissing the complaint, in an action to recover damages for the death of plaintiff's intestate who, on May 26, 1871, while attempting to board a street car in the city of New York, was struck and run over by an ambulance wagon, driven by an employee of the Commissioners of Public Charities and Corrections.

FOLGER, J. It is sought to charge the defendant in this case, upon the rule that the employer must answer for the negligent act of the servant: the rule of *respondeat superior*. And it is clear that upon no other principle can the defendant be charged. Conceding that the ambulance wagon and the horse before it, were the property of the defendant, there is no intimation that the establishment was not, in all respects, such as was fitting for the use for which it was kept, and to which it was in fact put at the time. It was personal property, well adapted to the

¹ The exemption of municipal corporations from liability for torts committed in the exercise of governmental and public powers, conferred for purposes pertaining to the administration of general laws made to enforce the general policy of the state, rests upon the rule that sovereignty is not subject to suit, except by its own consent. The state or general government is as capable of wrong as an individual, but the difficulty lies with the remedy, not with the right. (See Cooley on Torts [2d ed.], 141; *City of Galveston v. Posnainsky*, 62 Texas, 118, 127.)

"As to what are public and governmental duties, and what are private or corporate duties, the courts are not in harmony, and their decisions do not furnish any definite line of cleavage. It is important, in every case, to determine the liability by a true interpretation of the statutes under which the corporation is created. Indeed, it may occur that the liability of a municipality depends exclusively on the statute.

"At one extreme, the exemption of municipal corporations from liability for torts is clear. Thus, they are not liable for damages consequent upon conduct of fire, police, health, or public park departments, or for the exercise or non-exercise of a discretionary, legislative, or judicial power as distinguished from a ministerial power.

"At the other extreme, municipalities are generally held liable for negligence, in construction, maintenance, or use of their streets, sidewalks, sewers, and levees. They are answerable in damages for trespass on private property. While a city is not ordinarily liable for failure to exercise its corporate power to abate a nuisance of some third party doing damage, it is responsible for wrongful exercise of power to abate a nuisance, and for maintaining a nuisance, of its own.

"Between these extremes, the line of distinction is often obscure." Jaggard on Torts, 1., p. 173 *et seq.*, and cases there cited.

service in which it was engaged, in itself innoxious. The harm to the plaintiff's intestate resulting alone from the immediate negligent use of it by the driver of the wagon, the servant in whose charge it was; on the ground alone of a responsibility for that negligence, as the negligence of its servant, can the defendant be charged. This rule of *respondeat superior*, is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful or well behaved, and to direct and control them while in his employ. *Kelly v. Mayor*, 11 N. Y. 432. The rule has no application to a case in which this power does not exist. *Blake v. Ferris*, 5 N. Y. 48. It results from the rule being thus based, that there can be but one superior at the same time and in relation to the same transaction (*Langher v. Pointer*, 5 Barn. & Cres. 560); as the law does not recognize two principals who are unconnected and severally responsible. *Hobbit v. L. & N. W. Railway*, 4 Exch. 253; *Pack v. The Mayor*, 8 N. Y. 222. And yet there may be sub-agents, servants under a servant; and whether they be appointed by the master or principal directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. *Quarman v. Burnett*, 4 Mees. & Welsb. 499. That a municipal corporation, as is the defendant, may be placed by the facts of a certain case under the effect of this rule, and made answerable for the negligent use of its well adapted personal property by its servant or sub-servant, need not be denied. *Lee v. Sandy Hill*, 40 N. Y. 442; *Clark v. Washington*, 12 Wheat. 40; *Scott v. The Mayor*, 37 Law & Eq. 495. The difficulty is not here; it is in determining, in a particular case, whether the negligent employee is the servant of the municipality, for it is not every one who has in charge personal property owned by the municipality, and sets about some lawful act with it within the municipal bounds, that is its servant; nor even if his appointment comes intermediately or immediately from the municipality itself. If the act of the officer or the subordinate of the officer thus appointed, is done in the attempted performance of a duty laid by the law upon him and not upon the municipality, then the municipality is not liable for his negligence therein. Such is the general principle laid down in *Martin v. The Mayor*, 1 Hill, 545, and re-asserted in *Lorillard v. The Town of Monroe*, 11 N. Y. 392, and in other cases. See also, *Russell v. The Mayor*, 2 Denio, 461; *Bk. Comm. v. Mayor, etc.*, 43 N. Y. 184-189. There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. *Lloyd v. The Mayor*, 5 N. Y.

374. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents. *Eastman v. Meredith*, 36 N. H. 284. Where the duties which are imposed upon municipalities are of the latter class, they are generally to be performed by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants, of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts or omissions of the subordinates by them appointed. *Fisher v. Boston*, 104 Mass. 87. And where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. It has appointed or elected him, in pursuance of a duty laid upon it by law, for the general welfare of the inhabitants or of the community. *Hafford v. New Bedford*, 16 Gray, 297. He is the person selected by it as the authority empowered by law to make selections; but when selected and its power exhausted he is not its agent, he is the agent of the public for whom and for whose purposes he was selected. So that it may be, that a driver of an ambulance wagon owned by the defendant, is neither its servant nor under-servant, for whose negligence it is responsible. How this is, is to be arrived at by a consideration of the provisions of law, under which the driver took charge of and conducted the horse and wagon. It is easily gathered from the case that he was not chosen immediately by the defendant, nor by any of its agents falling within the class of its executive officers, nor was he immediately controllable or removable by it or by them. He was immediately selected by, was under the immediate control of and power of removal of, the commis-

sioners of public charities and correction. His payment came immediately from them, though the moneys therefor came out of the municipal treasury. Hence, he was no nearer, at the best for the plaintiff, than a sub-agent of the defendant; and not that, unless the commissioners of charities and correction were agents of the defendant rather than public officers of the greater public. These commissioners have their direct creation, their direct grant of power and their direct imposition of duty from the act of 1860 (Laws of 1860, chap. 510, p. 1026), though they succeed to the powers and duties of similar officers theretofore existing. By this act that department is created in the city and county of New York, and it is declared that there shall be chief officers thereof, and their name of office is designated. (Sec. 1.) They thereby have their appointment from the comptroller of the city and county, though since then they are made a department of the city and appointable by the mayor. Laws of 1870, chap. 137, p. 366, §§ 29, 30; pages 386, § 80. It is not needed that I minutely enumerate all the powers which were conferred upon this department and its chief officers. They were powers of control, management, maintenance and direction, over all the real and personal property which theretofore was of the almshouse department, with certain exceptions immaterial here, and of appointment and removal of subordinate officers, and to require of the supervisors of the county the levy by tax of such moneys as should be needed by them, and of control of the poor and of certain other persons. The duties of this department and its head officers were to care for paupers, for poor and destitute children, for lunatics and strangers, and for certain persons committed for offences. This becomes the practical question: Are the acts, which are to be done by the commissioners of charities and correction, acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the legislature for the public benefit; or are they acts done for the defendant, in what may be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public? *Oliver v. Worcester*, 102 Mass. 489. There can be but one answer. The defendant is in no different position, in kind, from that in which is placed a township the most retired, the most sparse in population, in the State. The latter is under a law which requires its electors to elect officers, whose powers and duties are of the kind which the commissioners of charities and correction have. Those officers may for the time, as do the commissioners permanently, employ servants. The town has not the selection of those servants, nor the control nor power of removal of them. Nor is it interested, as a municipal division of the State, for its private emolument or advantage, in their acts. The overseers of the poor of a town, and the commissioners of charities and cor-

rection, are public officers, though getting their right of office from a circumscribed locality; and the acts which they may do, are to be done in their capacity as public officers, in the discharge of duties laid upon them by the law for the public benefit, and far removed from acts done by city or town, in its municipal character, in the management of its property for its own profit or advantage. It is seen at once that the powers and duties of the commissioners of charities and corrections are not to be exercised and performed for the special benefit of the defendant. It gets no emolument therefrom, nor any good as a corporation. It is the public, or individuals as members of the community, who are interested in the due exercise of these powers and the proper performance of their duties. They are such powers as are to be held by some officers throughout the State in every part thereof, such duties as are to be performed in every local political division of the State, not for the peculiar benefit of such division but for the public, in the discharge of its duty to suffering or wayward members of the whole body politic. The territorial boundaries of the defendant are taken by the legislature acting as the organ of the sovereign power, and within them is created a department, and constituted a board of chief officers which, within those boundaries, is to have the power to use the public moneys of that political division of the State, for the due discharge of the duty of the State in that locality to the poor, the crazed, the wicked. It is a public duty laid upon the defendant, as a convenient mode of exercising a function of government, that it should, through its chief executive officer, from time to time appoint the chief officers of this department, and from time to time supply it with the means of performing its special public duties. These chief officers, though in a sense its officers, as having no power unless after appointment by it, and as mainly confined within its territorial boundaries, are yet officers of the State government, in the sense that they perform its function within a designated political division of the State. The defendant may not control them, save in strict accordance with the provisions of law. It does not select, nor control, nor remove, nor immediately pay their subordinates, their agents, their servants, and may not do so. How then does the principle of *respondeat superior*, apply to its relations to them and to the plaintiff, upon the case which she brings here? Nor does a review of all the various legislative provisions by which, in this division of the State, like duties have been performed by the exercise of like powers, though by officers, predecessors of these, deriving authority in slightly differing ways and to slightly differing extent, lead to a different conclusion as to the relation of the defendant to them. Through all the changes of enactment, it has been a duty laid upon this political division of the State, to provide the officers and the moneys for the care of certain classes of citizens; a duty, from the discharge of which no especial corporate benefit was

to be had, and which was but the exercise of general power through local instrumentalities. The driver, the negligent actor, was the servant of the commissioners of the department of charities and correction. He was appointed by them, and put in charge of property of the defendant which was under their especial control. He was under their control only, liable to direction and removable by them only. He received his compensation directly from them, at a rate fixed by them. He could have but one superior liable for his negligent acts. The defendant was not that superior; for he was not its servant by immediate appointment, nor was he its sub-servant; for the commissioners though appointed by the defendant, in obedience to the statute, were selected to perform a public service not peculiarly local or corporate, because that mode of selection was deemed expedient by the legislature in the distribution of the powers of government, and are independent of the defendant in the tenure of their office and the manner of discharging their duties, are not to be so regarded as servants or agents of the defendant, for whose acts or negligences it is liable, but as public or State officers with the powers and duties conferred upon them by statute.

There are cases, some of which are cited by the plaintiff, which are supposed by counsel to conflict with these views, but they are to be distinguished, and rest upon principles at harmony with those relied upon here. Where the duty is upon the city itself and not upon public officers appointed by it, where it accepts the duty and the power to perform it, and itself, by its own agents, sets about the work, or undertakes to set about it by its own agents, then, for negligent omission to do or for doing in a negligent way, it may be liable. Such was *Jones v. New Haven*, 34 Conn. 1. The power there given, from which the duty arose which was neglected, was said to be a power or privilege conferred upon the city at its request, and that the duty was not a public one. And so where it authorizes a use of its corporate property, which use itself makes that property harmful to others, it is liable. Such is understood to be one of the grounds on which went *Bailey v. The Mayor*, 2 Denio, 433. And the duty of keeping in repair streets, bridges and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rests upon an express or implied acceptance of the power and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act. *Conrad v. Trustees of Ithaca*, 16 N. Y. 158. It is not always easy to say within which class a particular case should be placed. But when it is determined that the power and duty are given and taken for the benefit of the corporation as a corporate body, and the act to be done is to be done by it through agents of its appointment and under its control and power of removal, there is no doubt of its liability for negligent omission or negligent attempt at performance.

When the powers created and duly enjoined are given and laid upon officers to be named by the corporation, but for the public benefit and as a convenient method of exercising a function of general government, and the corporation has no immediate control nor immediate power of removal of those officers, nor of their subordinates and servants, then it is not liable for their negligent omission or action. This court is of the opinion that in the light of past decisions upon these points this case falls within the latter class.

The judgment must be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

¹ "The clearly settled doctrine that a municipality is not liable for negligence connected with the operation of its fire departments is beyond doubt to be placed upon the general ground that protection from fire is a function involving public interests. By the majority of cases the explanation given is that the maintenance and operation of fire departments is provided by the city not in its ordinary corporate capacity, but as a part of the State government. If the municipality is acting in the capacity of a governmental agency it cannot be held for negligence, since those guilty of the lack of care were not its servants, but those of the State, which cannot be sued for lack of a forum. This explanation is unassailable with regard to fire service, if the test of the governmental capacity in that respect is the fact that the city acts 'in obedience to an act of the Legislature * * * in pursuance of a duty imposed by law' (*Hafford v. New Bedford, Mass.*, 1860, 16 Gray, 297), or that the act is one 'from which the city, as a corporation, derives no benefit or advantage' (*Gillespie v. Lincoln*, 1892, 35 Neb., 34). But a more scientific test seems to be furnished by the question whether the function is in fact one of general State government (*Jewett v. City of New Haven*, 1871, 38 Conn. 368). Under this criterion it is much less clear that the city operates fire departments as a State agent, the duty of the State to protect from fire being by no means well established. Apparently influenced by this consideration certain courts have inclined to hold that fire protection is a local function (*State v. Denny*, 1888, 118 Ind. 449, 470; c. f. *State v. Moores*, 1895, 55 Neb., 480), and to place the exemption of municipalities from liability upon the ground of public policy (*Wilcox v. Chicago*, 1883, 107 Ill. 334). However, the view that fire service is a State function is too well established to be generally attacked (*Tislin v. Boston*, 1870, 104 Mass., 87; *Dodge v. Granger*, 1892, 17 R. I., 664; *Burrill v. Augusta*, 1886, 78 Me., 118; *Hayes v. Oshkosh*, 1873, 33 Wis. 314).

"It is interesting to note the application of these two views upon liability for injury caused by a municipality's vessels upon navigable waters, and consequently under admiralty jurisdiction (*The Max Morris*, 1890, 137 U. S., 1). In the leading case in this connection (*Workman v. The Mayor of N. Y.*, 1900, 179 U. S., 552), reversing the lower court, which, in accordance with the general rule, had held the city not liable, the Supreme Court held that the City of New York was liable *in personam* for damage caused by one of its fireboats, the fire department being 'an integral branch of local administration.' The decision is a square assertion of the view that protection from fire is not a State function. On the other hand, a previous Federal case (*Thompson Nav. Co. v. Chicago*, 1897, 79 Fed., 984) had reached exactly the same result under the other theory. Since by its view the fire service was a State function, the individuals guilty of negligence were not the servants of the city. But as the liability in admiralty may be based on the *ownership* of the vessel causing the injury, the city as owner was held without regard to its relationship with those operating the vessel.

(c) CHARITABLE.

CORBETT v. ST. VINCENT'S INDUSTRIAL SCHOOL.

(177 New York, 16.—1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court entered upon an order reversing a judgment entered upon a verdict in favor of the plaintiff and granting a new trial.

O'BRIEN, J., The plaintiff, a boy under sixteen years of age, brought this action in the name of his guardian *ad litem* against this defendant, to recover damages for a personal injury sustained by him while confined as a prisoner by the defendant, having been required to do some work in a laundry in which a machine called a "steam mangle" was in operation in doing the work. The plaintiff was assigned to duty in operating the mangle, assisted by another boy. He had never worked upon such a machine before, and it is claimed that he received no instructions from the managers of the defendant institution in regard to the management of the mangle, and while operating it on September 14th 1900, his right hand was caught between the cylinders and severely burned, mutilated and crushed, and thus he became permanently disabled. The case was submitted to the jury and a verdict rendered for the plaintiff, upon which judgment was entered, but was reversed at the Appellate Division.

In view of the extensive discussion which the case received in the learned court below, the only question that need be discussed in this court is whether the general law of negligence has any application to

" Relying upon the doctrine of *Workman v. City of New York* (*supra*), the United States District Court for the District of Oregon has recently held the Port of Portland, a municipal corporation organized with purely governmental functions for harbor maintenance, to be liable *in personam* for the negligence of its vessels (*U. S. v. Port of Portland*, 1906, 145 Fed., 865). On account of the peculiar nature of this 'municipality,' the decision seems to have carried the rule of *Workman v. City of New York* to unwarranted lengths. Clearly, the liability might have been imposed under the theory of *Thompson Nav. Co. v. Chicago* (*supra*), since the ownership of the vessels by the port was undisputed. It might equally well have been placed on the ordinary theory of negligence, the State in creating a municipality of solely governmental functions with power to 'sue and be sued,' having virtually submitted to the ordinary tribunals in respect of such matters. But since the corporation was admittedly created as 'an arm of the State, to perform its functions,' a capacity entirely inconsistent with 'local administration' as the phrase was used in *Workman v. City of New York*, it would seem that the theory of the latter case was entirely inapplicable." 7 Columbia Law Review, 127.

the case, inasmuch as it is not claimed that there was any neglect on the part of the officers or managers of the defendant in the selection of their inferior agents, even though the injury occurred by the negligence of such agents. The relation of master and servant did not exist between the plaintiff and the defendant, nor any other relation based upon contract. The plaintiff, instead of being committed to a prison or reformatory, was confined in this institution in pursuance of law, and even if it be true, as claimed by the plaintiff's counsel, that he received no instructions as to the operation of the machine, or any warning from the defendant that it was dangerous, or that the defendant posted no rules or regulations governing the management of such machinery, the question arises whether the defendant can be subjected to liability. The defendant is a charitable institution, organized under the laws of this state to support and maintain an industrial school and asylum for the sustenance and education of male orphan children. Boys were committed to the defendant from various counties by the overseers of the poor, justices of the peace, police magistrates and judges. For the care, education and support of such boys the counties, including Onondaga county, allowed and paid to the defendant for most of the boys two dollars per week. It appears that the defendant had a farm in connection with its institution upon which it raised vegetables and hay for the institution, and upon which some of the boys did some work. It also manufactured clothing for the boys and made stockings for their use. For these purposes defendant had sewing and knitting machines. The articles so manufactured by the inmates of the institution were not sold unless there was a surplus. The defendant maintained a school for these boys, at which they were required to attend, and also maintained a laundry, in which was laundered the clothing of the inmates, but not for the public or for any one outside of the institution. There is no proof in the case that any of the agents of the defendant were incompetent to discharge the duties assigned to them, or that the managers were negligent in their selection or retention of its employees. On the 19th day of August, 1900, the plaintiff, who was then about fifteen years of age, was arrested upon the charge of petit larceny. He was tried and convicted of this offense before a police justice, and thereupon committed to the defendant institution, where he was received and detained until after the occurrence of the accident in question, when he was discharged. By section 713 of the Penal Code the court in which he was convicted was required to commit him to some reformatory, charitable or other institutions authorized by law to receive and take charge of minors. There is no dispute as to the fact that this institution was authorized to receive and take care of the plaintiff, and no question as to the legality of his commitment. It is quite true that the defendant was not obliged to receive him, but having decided to place him in the institution, the

mere fact that it could have refused has no bearing on the question of liability.

When we read the statutes under which this institution was incorporated and which authorized county authorities to make contracts with it for the care and custody of juvenile delinquents, and the provision of the Penal Code authorizing magistrates and other authorities to send boys under the age of sixteen years to such institutions, it is manifest that the state has made use of these institutions for the purpose of caring for and taking charge of minors convicted of crime. That is one of the functions of government which the state may exercise and which it may delegate to charitable institutions created under its laws; and for the purpose of taking care of the morals of the youthful delinquent himself. In other words, it was thought to be wise to send boys of that age to this institution rather than confine them in the state prisons or county jails, where they would necessarily mingle with older and more hardened criminals. This was, doubtless, the policy which was expressed in the statutes referred to. The question here is whether the defendant, acting so far as this plaintiff was concerned as a governmental agency for the care of such convicts, is not entitled to the same immunity from liability for damages in case of such accidents that is conceded to the state itself and to all its municipal divisions.

It is quite possible that if this case is governed by the general law of negligence, as applied to the relation of master and servant, there was sufficient evidence to justify the submission of the case to the jury. We do not, however, consider it necessary to pass upon that question, since it has been fully disposed of in the court below, and we think that, inasmuch as the defendant, in receiving and taking charge of the plaintiff, was exercising functions which in a large sense belonged to the state, it cannot be held liable for accidents of this character. This view is well supported by abundant authority, as will be seen by the adjudged cases which it is only necessary to cite without comment. (*Lewis v. State*, 96 N. Y. 71; *Hughes v. County of Monroe*, 147 N. Y. 49; *McDonald v. Mass. General Hospital*, 120 Mass. 432; *Benton v. Trustees of City Hospital of Boston*, 140 Mass. 13; *People ex rel. N. Y. Inst. for Blind v. Fitch*, 154 N. Y. 14; *People ex rel. Mt. Magdalen School v. Dickson*, 57 Hun, 312; *Collins v. N. Y. Post Graduate Medical School*, 59 App. Div. 63; *Joel v. Woman's Hospital*, 89 Hun, 73; *Springfield Fire & M. Ins. Co. v. Village of Keeseville*, 148 N. Y. 46.) The rule which exempts the defendant from damages resulting from accidents of this character would seem to be founded upon the plainest principles of reason and justice. The plaintiff was really a prisoner in the custody of the defendant, deprived of his liberty, and all his conduct and movements subject to such regulations as the defendant might reasonably prescribe, just as in the case of convicts in the prisons or jails of the state. In the interest

of humanity it was thought to be wise to subject such young boys to a milder punishment than is meted out to older criminals. It was the duty of the defendant, having decided to receive the plaintiff into custody, to subject him to such care and discipline as would be likely to produce a reformation in his life, and to this end his employment at some useful labor was thought to be and doubtless was necessary. The defendant is in no sense a business enterprise; it has no stockholders and is not organized for money-making purposes. The fact that it has a farm, upon which it employs boys confined in the institution to some extent, does not change its character as a charitable institution. It appears that there were something less than two hundred boys in the institution at the time this accident happened; they were sent there, just as the plaintiff was, from various counties in the state. It is not at all likely that the institution could support these boys upon the small pittance of two dollars a week, or less, as it was in some cases. Their proper support was derived from the farm and some other industries where the labor of the inmates could be utilized, and, of course, the proper care of their clothing rendered it necessary to keep and maintain a laundry. If, while working in that laundry upon a machine, the plaintiff was injured, as the record shows that he was, the result is doubtless unfortunate, but it is obvious that the defendant cannot be made liable in damages for the injury.

We think, therefore, that the judgment must be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN and WERNER, JJ.,
concur.

Judgment affirmed.

GLAVIN V. RHODE ISLAND HOSPITAL.

(12 Rhode Island, 411.—1879.)

ACTION to recover damages for malpractice.

DURFEE, C. J. This is an action on the case to recover damages for unskilful and negligent surgical treatment. The declaration sets forth that the plaintiff, having received injury on his hand and fingers for which he was in need of surgical and medical treatment and care, gave himself into the charge of the defendant corporation, who were owners of a large hospital where they were in the habit of receiving persons needing such treatment and care, and of treating and caring for them for hire; and that in consideration of being so received and treated with skill and care, he promised to pay the defendant corporation a reasonable

compensation therefor, and that the defendant corporation, in consideration thereof, received him and promised to supply him with such surgical and medical treatment, skill and attention as were necessary for the care and cure of his injuries. The declaration also sets forth that the corporation, its officers, agents and servants, regardless of its and their duty, neglected, properly to care for the plaintiff and his injuries, or to supply such medical and surgical treatment as was needed for their care and cure; but on the contrary conducted so carelessly, improperly and unskilfully, that his hand and fingers by reason thereof became ulcerated and gangrenous and likewise his arm, so that his life was endangered and his arm had to be amputated at or near the shoulder, etc. The declaration also contains counts charging the defendant corporation with a neglect of duty in other ways, and especially in that, regardless of the obligation incumbent on it, it neglected to provide careful, competent and skilful officers, agents and servants to care for, attend to and treat him and his injuries.

On the trial to the jury the plaintiff submitted testimony to show that on the 3d of October, 1873, he had two fingers of his right hand accidentally sawed off by a circular saw in a lumber yard where he was employed; that he was immediately taken to the hospital, where he was received by the superintendent, and committed to the care of the surgical interne, who etherized him and undertook to dress his wound; that a profuse hemorrhage, occurred, being occasioned, as the plaintiff claims, by the negligence or unskilfulness of the interne; that the interne, after repeatedly trying in vain to arrest the hemorrhage by ligating the arteries, applied a tourniquet to the plaintiff's arm so tightly as to stop circulation, and kept it applied for nearly seventeen hours, before the arrival of a surgeon who was skilful enough to ligate the arteries; that the plaintiff, in consequence, suffered excruciating pain, his arm being enormously swollen, and that afterward his arm mortified so that he had to have it amputated, and did have it amputated, after leaving the hospital, just below the shoulder joint.

The plaintiff also submitted testimony to show that his injury was such, especially in view of the hemorrhage, that some one of the experienced surgeons, attendant on the hospital, should have been immediately summoned; but that in fact no one of them was sent for until after nearly nine hours, and no one came until after nearly seventeen hours, though there were four, subject to call, residing and having their offices within a mile of the hospital. Further testimony was introduced by the plaintiff showing the treatment which he received both while he was in the hospital and after he left; showing the degree of care which was used in selecting the interne, and showing the character of the corporation and the rules and regulations in force in 1873. It appeared that the plaintiff was taken from the hospital by his friends

against the advice of the surgeon, and that when he left, October 22, 1873, a bill for board and attendance at \$8.00 per week, amounting to \$21.71, was presented to him in behalf of the defendant corporation, which was subsequently paid.

For the defendant corporation testimony was introduced to explain the management of the hospital generally, as well as the circumstances of the case of the plaintiff, and to show that there was no want of reasonable care, skill, and diligence, on the part of the defendant corporation. Testimony was also introduced to show that the hospital was administered as a charity; that its income was mainly derived from its endowments and from voluntary contributions; that the physicians and surgeons attendant on the hospital, and the medical and surgical internes, gave their services without compensation, except that the internes, who were required to be constantly in attendance, had their board and lodging in the hospital, and that the bill which was rendered to the plaintiff was designed only to cover board, washing, warmth, and the services of nurses and ward tenders.

After the introduction of the testimony and the argument of the case to the jury, the court instructed the jury that no testimony had been submitted which entitled the plaintiff to a verdict for damages, and directed the jury to return a verdict for the defendant corporation. The ground of the instruction was, that the defendant corporation being the dispenser of a public charity, and being dependent for its support, in a great measure, on voluntary grants and contributions, was, for reasons of public policy, exempt from liability for any negligence or unskilfulness on the part of its trustees, agents, servants, physicians, or surgeons, or of its medical or surgical internes; and that if any patient in the hospital suffered injury in consequence of any such negligence or unskilfulness, his remedy, if any he had, was to prosecute the person or persons who were directly chargeable with the negligence or unskilfulness, and not to bring his action against the defendant corporation.

The plaintiff contends that this instruction was erroneous, and that he was entitled to recover, *first*, because the defendant corporation delivered him over to an incompetent and unskilful interne, in selecting whom for his place, the corporation did not exercise proper care; *second*, because the interne, acting within the scope of his appointment, unskilfully and negligently cared for him; *third*, because the interne caused his hemorrhage by his unskilfulness and negligence, and *fourth*, because the plaintiff being in a critical condition, it was the duty of the interne, under one of the rules of the hospital, to send immediately for some one of the attendant surgeons, and the duty of the corporation, under its charter, having established the rule, to put it in execution.

The court, in giving its charge to the jury, was guided by *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; s. c., 21 Am. Rep. 529.

In that case a hospital patient sued the corporation for unskilful surgical treatment by a house pupil, a functionary similar to a surgical interne. There was no evidence of any want of care in selecting the house pupil, and the court held that without such evidence the action could not be maintained, and at the same time strongly intimated an opinion that it could not be maintained even with such evidence, for the reason that the corporation could not be held to have agreed to do more than furnish hospital accommodations, which the plaintiff had had, and also for the further reason that any judgment recovered against the corporation could only be satisfied out of funds which being dedicated to the charity could not be lawfully used to pay it.

The Supreme Judicial Court of Massachusetts, in the case above cited, referred to *Holliday v. St. Leonard*, 11 C. B. (N. S.)192, decided by the Court of Common Bench, in 1861, as authority for the point that the corporation was not liable to be sued for the tort of the house pupil without proof of negligence in selecting him. The doctrine enounced in *Holliday v. St. Leonard* is that a corporate or *quasi* corporate board or body having a public trust or duty to discharge gratuitously, is not liable for the torts of its servants or employes if it is personally without fault. The plaintiff calls our attention to cases in which *Holliday v. St. Leonard* has been qualified or impugned. *Mersey Docks v. Gibbs*, 11 H. L. 686; L. R. 1 H. L. 93; *Forman v. Mayor of Canterbury*, L. R. 6 Q. B. 214; *Coe v. Wise*, 1 id. 711; 5 B. & S. 440, 458. These cases hold that a board or body having work to do for the public gratuitously are liable for the torts of their servants or employes, the same as a private business corporation, provided they have funds or are in receipt of an income out of which a judgment against them can be satisfied. *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458; 9 id. 378. The authority of *McDonald v. Massachusetts General Hospital*, in so far as it rests upon *Holliday v. St. Leonard*, is seriously impaired by these cases, and the question arises whether it might not have been better decided on the other grounds suggested in the opinion of the court.

The other grounds suggested were two. The first was that the corporation could not be presumed to have agreed to do more than furnish hospital accommodations, leaving the patient to find his own physician or surgeon. In such a case the corporation would plainly not be liable for the torts of the physicians or surgeons, for in such a case they would not be its servants and it would not have assumed any responsibility in their selection. But that is not this case. Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A out of charity employs a physician to attend B, his sick neighbor, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable

to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. The relation of master and servant is not established between A and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognize the right of the corporation, while retaining them, to direct them in their treatment of patients.

But though the relation of master and servant cannot be said to exist between the hospital and the physicians and surgeons attendant on it, the hospital does nevertheless assume a responsibility in that it uses its own judgment, or that of its trustees, in selecting them, and impliedly therefore undertakes to exercise reasonable care to get such as are skilful and trustworthy in their professions. A patient has the right to rely on the exercise of such care, and consequently if, through the neglect of the hospital to exercise it, he receives an injury, he is entitled to look to the hospital for indemnity, unless the hospital enjoys some extraordinary exemption from liability.

In the case at bar, however, the injury was not received from a physician or surgeon, but from a surgical interne, and it may be that a surgical interne stands on a different footing. There are some cases of minor importance in which the internes are allowed to act as physicians and surgeons, and in such cases I think that their relation to the corporation does not differ from that of a visiting physician or surgeon. But the internes act in still another capacity. The corporation undertakes to furnish physicians and surgeons for all kinds of cases, including the most critical. It has a regular staff of physicians and surgeons. But inasmuch as these are not, like the internes, constantly in attendance at the hospital, they must frequently be sent for. The corporation undertakes to send for them, and of course it must do it through an agent. The internes are the persons appointed to perform this duty for it. A rule of the hospital prescribes that in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring an immediate operation, the interne shall send for the surgeon of the day, and, if he cannot be found, for one of the other surgeons. Here then we have the relation of principal and agent, or master and servant. If the interne neglects to call the surgeon in the class of cases designated, his neglect is the neglect of the corporation. Now the plaintiff contends that his injury was such that under the rule a surgeon should have been immediately sent for, and that the interne's neglect to do it cost him his arm. He also contends that the corporation did not use

proper care in selecting the interne, who was incompetent for his position, and thereby he suffered the injury complained of. He contends that he was entitled to recover on both these grounds, and if the evidence was sufficient to establish them, we think that he was entitled to recover on both grounds, unless the hospital enjoys some peculiar immunity.

This brings us to the important question whether the hospital does enjoy any peculiar exemption from liability. The claim that it enjoys such an exemption rests upon two grounds: to wit, on the ground of public policy, and on the ground that the hospital had no funds except such as are exclusively dedicated to the charitable uses for which it was established, and which therefore cannot be applied to indemnify a patient who has been injured by the negligence or malpractice of a physician or surgeon, or of a medical or surgical interne.

The first ground is the ground on which the plaintiff was nonsuited. The argument is that hospitals, like the Rhode Island Hospital, are a public benefit; but if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they shall be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great public charity, such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the legislature.

The second ground is one of the grounds suggested in *McDonald v. Massachusetts General Hospital*. No authority was cited in that case except *Holliday v. St. Leonard*, previously mentioned. The defendants, however, have referred us to *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507, which is very much in point. Heriot's Hospital was an eleemosynary foundation created under a will for the benefit of fatherless boys. The suit was in behalf of a boy who was alleged to have been illegally refused the benefit of it. The question was whether the action would lie against the trustees as such for damages for the refusal. The House of Lords held that the plaintiff had no right to indemnity out of the trust funds. Lord COTTENHAM was of the opinion that to give damages out of the trust fund would be to divert it from its proper purpose. Lord CAMPBELL thought it would be contrary to reason, justice, and

common sense to sanction the suit. "Damages are to be paid," he said, "from the pocket of the wrongdoer, not from a trust fund." Lord BROUGHAM strongly expressed the same opinion.

The authority relied on to support the decision was a decision of the House of Lords in *Duncan v. Findlater*, 6 Cl. & Fin. 894. There the action was against trustees appointed under a public road act, to charge them in their *quasi* corporate capacity for an injury occasioned by the negligence of the men in making the road, and the House of Lords held that the action was not maintainable. The case resembles *Holliday v. St. Leonard*, and like it, in the light of the later decisions, it has no value as a precedent for any case where there are funds which can be applied to the payment of damages.

We have previously, in this opinion, cited the cases which limit the authority of *Holliday v. St. Leonard*. It may help us to consider the leading case more in detail. The leading case is *Mersey Docks v. Gibbs*, 11 H. L. 686, decided in the House of Lords in 1865. The action was against a *quasi* corporate board charged with the duty of keeping certain docks in order, and authorized in consideration thereof to collect tolls and dock rates. The board had no interest in the rates and tolls, being bound to expend them on the docks or in the payment of a debt incurred in building them. A vessel belonging to the plaintiff was injured in entering the docks in consequence of a neglect to keep them fit for navigation. The House of Lords decided that the action for the injury would lie against the board, the plaintiff being entitled to indemnity out of the public fund. The case was decided with great deliberation the judges being summoned in. Mr. Justice BLACKBURN, after advisement, delivered the unanimous opinion of all the judges who heard the case. The opinion was that such corporations, though acting without reward, are in their very nature substitutions, on a large scale, for individual enterprise, and that in the absence of anything in the statutes which create them showing a contrary intent, it must be held that their liability was intended to be, to the extent of their corporate funds, the same as that of individual owners of similar works. He also remarked that if the true interpretation of the statute is that it casts a duty on the corporation, not only to construct the works, but also to use reasonable skill and care in their construction and in their maintenance for use, there is nothing illogical in holding that those who are injured by a neglect of the duty may maintain an action against the corporation, and be indemnified out of the funds vested in it by the statute. The case of *Duncan v. Findlater* was cited by Mr. Justice BLACKBURN in his opinion, and the language there used by Lord COTTENHAM, which was chiefly relied on as authority for the decision of *Feoffees of Heriot's Hospital v. Ross*, was expressly disapproved. It is remarkable, however, that the case of *Feoffees of Heriot's Hospital v. Ross*,

though cited by counsel, does not seem to have attracted the attention of either Mr. Justice BLACKBURN or of the three learned lords who delivered concurring opinions.

The language used by Lord COTTENHAM in *Duncan v. Findlater* was criticised by Lord WESTBURY more pointedly even than by Mr. Justice BLACKBURN. He said in effect that he supposed Lord COTTENHAM regarded the funds of statutable boards as being in the nature of trust property, and had the idea that trust property would be protected in equity from seizure and sale on execution for the torts of the trustees. He expressed the opinion that this belief was erroneous. "It is much more reasonable," he says, "in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint and his title to relief against the individual corporators who have wrongfully used the name of the corporation."

In all the English cases decided since the decision of *Mersey Docks v. Gibbs*, which we have seen, the cases of *Duncan v. Findlater*, and *Holli-day v. St. Leonard*, as authority for the broader doctrines declared in them, are uniformly regarded as overruled.

In view of these later decisions the question here is, whether a charitable corporation, like the Rhode Island Hospital which holds its property for the charity, is more highly privileged than a corporation created for public purposes, which holds its property for such purposes; whether, in fact, because it holds its property for the charity, it is relieved from all responsibility for the torts or negligences of its officers, trustees, agents, or servants. We have come to the conclusion, after much consideration that it is not. We understand the doctrine of the cases which we have just been considering to be this; that where there is duty, there there is, *prima facie* at least, liability for its neglect; and that when a corporation or *quasi* corporation is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation or *quasi* corporation to exercise such care and skill; and that the fact that it acts gratuitously, and has no property of its own in which it is beneficially interested, will not exempt it from liability for any neglect of the duty, if it has funds, or the capacity of acquiring funds, for the purposes of its creation, which can be applied to the satisfaction of any judgment for damages recovered against it. We also understand that the doctrine is that the corporate funds can be applied, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them. We do not understand, however, that the corporate property is all equally applicable. For instance, in the case of *Mersey Docks v. Gibbs*, it was not decided that the docks themselves could be resorted to, but only the unapplied funds which the board then had or might afterward ac-

quire. So in the case at bar; it may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages. But, however that may be, we understand that the defendant corporation is in the receipt of funds which are applicable generally to the uses of the hospital, and following the decision in *Mersey Docks v. Gibbs*, we think a judgment in tort for damages against the corporation can be paid out of them. Indeed, we cannot see why these funds are not as applicable to the payment of damages for tort as to the payment of counsel for defending an action for such damages. Both payments are to be regarded as incident to the administration of the trust.

*Petition granted.*¹

HEARNS v. WATERBURY HOSPITAL.

(66 Connecticut, 98.—1895.)

HAMERSLEY, J. The Waterbury Hospital was incorporated by special Act of the legislature, "for the purpose of establishing and maintaining a hospital in the town of Waterbury." Under this authority it was organized "for the purpose of furnishing medical and surgical care, nurses, medicines, and food, to patients suffering from disease or from injuries." It has no capital stock, and its members can derive no profit from the corporation. These features clearly indicate a "charitable corporation" within the meaning of our law. *Asylum v. Phoenix Bank*, 4 Conn. 172; *Bishop's Fund v. Eagle Bank*, 7 id. 476; *Town of Hamden v. Rice*, 24 id. 350.

To this hospital the plaintiff applied for treatment of a fractured kneecap; and brings this action to recover damages for injuries caused, as he claims, by the unskillful and negligent treatment which he received at the hospital.

The complaint, after stating the incorporation of the hospital and the adoption of certain by-laws, alleges that the plaintiff requested of the proper officers admission to the hospital, and promised to pay the defendant such reasonable compensation as it should demand; that the defendant in consideration thereof agreed to treat him with care and skill, and furnish him with surgical care, etc., for that purpose; that the defendant was guilty of negligence in the manner specified, and thereby violated its said agreement and duty; whereby the plaintiff was injured, etc.

¹ Concurring opinion by POTTER, J., omitted.

The defendant's answer denies the negligence and injury, and sets up a special defense to the action, reciting the purposes of its incorporation, and alleging that its by-laws provided that: "Neither the medical and surgical staff, nor physician or surgeon designated by them, nor any officer of the corporation, shall receive compensation from the hospital in any form for the duties performed in its behalf." To this special defense the plaintiff demurred. The court below overruled the demurrer and gave judgment for the defendant, and the plaintiff appealed from that judgment.

The demurrer to the defendant's answer cannot entitle the plaintiff to judgment if his complaint is insufficient; we therefore pass over the question which might have been raised as to the special defense alleged being a strictly legal way of presenting the defendant's claims, and consider the only question argued before us; namely, does the negligence alleged in the complaint entitle the plaintiff to recover damages from the defendant?

The negligence which caused the injury is stated to have been that of the attending surgeon and attending nurses while in performance of their duties; and in order to confine the issue as closely as possible, it was stipulated by the parties that, solely for the purpose of the disposition of this appeal, and without prejudice to any future proceedings, the court should assume upon the record that the defendant exercised due care in the selection of nurses, physicians and surgeons, by whose alleged negligence or want of skill and attention the plaintiff was injured. Possibly it might be claimed that the complaint raises the further question of the defendant's liability for its own negligence in failing to perform its alleged duty of appointing a house physician, or interne so called; but such claim has not been made, and we do not think it can properly be made upon this appeal; even if the question were not excluded by the stipulation of the parties, the record fails to show that it was raised on the trial and decided by the court below; it is not specified in the reasons of appeal, and in the argument before us was not discussed.

The only question with which we have to deal is the liability of the defendant for the negligent conduct of physicians and nurses employed by it, and in the selection of whom it has exercised due care. The conclusion we have reached makes it unnecessary to pass upon the question whether the hospital's attending physicians can really be regarded as standing to the corporation in the relation of servant to master, or to discuss the nature and extent of the corporate liabilities of an eleemosynary corporation. All questions essential to the disposition of the case presented by this appeal are settled by deciding upon the liability of the defendant for the negligence of its servants; *i. e.*, when a corporation like the defendant employs a servant who does not repre-

sent it in the way that every corporation must be represented by its directors or managers, but is simply employed for a special work in the same manner as if employed by an individual for the same work—is such corporation liable for an injury caused in the course of his employment by such servant, and due solely to his negligent conduct?

This question has never been decided in this state; it has however arisen in other states and in England; and has been so intermingled with the different one of the corporate liability of eleemosynary corporations for their own corporate negligence, that the review we make of cases illustrating the treatment the subject has received from other courts, will necessarily include some cases bearing more directly on the latter question.

The question arose in England in 1824, in the court of Common Pleas, in the case of *Hall v. Smith*, 2 Bing. 156. Commissioners for the town of Birmingham ordered a tunnel through a public street; the surveyor and contractor appointed by them to build it failed to put up guard rails or to provide lights. The court held that the commissioners were not liable; not because such a corporation, or *quasi* corporation for public purposes, was not liable for its negligence; not because the surveyor and contractor were not the servants of the corporation (the early case of *Bush v. Steinman*, 1 Bos. & Pul. 404, had not then been overruled) but because the rule of *respondeat superior* did not apply. BEST, C. J., said: "The maxim of *respondeat superior* is bottomed on the principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it:" and so the reason of the rule does not apply to trustees for public purposes, acting according to their best judgment and with the best advice.

In 1839, *Duncan v. Findlater*, 6 Clark & F. 894, was decided by the House of Lords. It was a Scotch case—an action against the trustees of a turnpike road for injuries caused by the negligence of a surveyor appointed by them. The only question actually decided in this case was that the trustees were not liable for an injury caused by the neglect of a person not standing in the relation of a servant to the trustees. But the language of Lord COTTENHAM went further, and stated the principle that unpaid trustees for public purposes can in no case be liable in their corporate or *quasi* corporate capacity. This statement was rejected in subsequent cases, and in *Trustees Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, was distinctly held unfounded in law.

The same year *Parnaby v. Canal Company*, 11 Ad. & E. 223, was decided, and held that when a statute of incorporation authorized a company to construct a canal and did not in special terms impose any duty in reference to its use, the general law imposed upon the company the duty to use reasonable care in making navigation secure. The case

is pertinent only because it defines the principle of implied corporate duty corresponding to granted corporate powers; which principle subsequent cases hold applicable to powers granted to trustees for public purposes and corporations for charitable purposes, as well as to corporations organized for profit.

Feoffees of Heriot's Hospital v. Ross, 12 Clark & F. 507, decided in 1846, has been frequently cited in American cases. The action was an attempt to apply trust funds, given by a private donor for founding a hospital (for the maintenance of fatherless boys), to be governed in pursuance of statutes established by him, towards the payment of damages caused by a refusal of the trustees of the fund to obey the statutes of the founder in respect to an applicant for admission to the hospital. The Scotch Court of Sessions ordered damages to be assessed against the fund, and upon appeal to the House of Lords two questions were presented: Did the statutes of the founder give to every eligible person a right to admission on application, without any discretion in the trustees as to selection? And second, can the damages caused by the wrongful refusal of trustees to admit an applicant entitled of right to admission, be recovered from the trust fund? The House refused to consider the first question, and reversed the order of the Court of Sessions on the ground that the wrong, if any, done to the applicant was done by the individual trustees who voted against his admission, and that they were liable in an action, and the trust fund was not. In *Duncan v. Findlater*, *supra*, the claim had been made that the Scotch practice of using trust funds to pay damages for injuries caused by their managers was authorized by Scotch law, and the House of Lords had decided that it was not authorized by Scotch law; and now, within a few years of that decision, when a Scotch court again holds that the condemned practice is authorized by Scotch law, the House makes short work of the case, refuses to consider a doubtful and important question involved, or to discuss an authority except *Duncan v. Findlater*, which had not been duly respected. The pith of the case appears in the remarks of each of the law Lords in reference to *Duncan v. Findlater*. Lord BROUGHAM says: "It would have been better had the court paid more attention to the high authority of that case as decided in this House, than here appears to have been paid to it." The main significance of *Heriot's Trustees v. Ross*, is in the assertion of the supremacy of the House of Lords in determining questions of Scotch law; the uniform severity with which the case has been ignored by the courts at Westminster in the cases which have since dealt elaborately with the question of the liabilities of corporations for public and charitable purposes, indicates that it is not regarded as an authority on the subject in that jurisdiction, and certainly there is nothing in the case that can aid the courts of other jurisdictions.

Holliday v. St. Leonard's, 11 C. B. (N. S.) 192, decided in 1861, held that the defendants, the vestry of a parish, were not liable for the negligence of servants in the performance of a public duty with which they were intrusted by statute. The case is decided on the ground that trustees for public purposes are exempt from the application of the rule of *respondeat superior* which would apply to private persons under like circumstances. (It was afterwards claimed that the opinion of ERLE, C. J., seemed to favor the erroneous *dictum* of Lord COTTENHAM in *Duncan v. Findlater*, that the exemption rested on the immunity of such corporations from all corporate liability, and not the exemption from the application of the rule of *respondeat superior* as stated by BEST, C. J., in *Hall v. Smith*; but when this claim was pressed in argument of *Coe v. Wise*, 5 Best & S. 440, ERLE, C. J., said, "I certainly never intended so wide a proposition.")

In 1863, the court of Queen's Bench, in the case of *Hartnell v. The Ryde Commissioners*, 33 L. J. Q. B. 39, held that trustees for public purposes charged with not having performed a duty cast on them by statute, were liable for special damage, and the court distinguished the case from *Metcalf v. Hetherington*, 11 Ex. 257, where such trustees were held not liable, because in that case the duty alleged to have been neglected did not clearly appear to have been imposed.

In 1864, *Coe v. Wise*, 5 B. & S. 440, was tried in the Court of Queen's Bench. Commissioners were directed by statute to make a cut, and maintain at its opening a sluice to exclude tidal waters. The sluice was properly made; but owing to want of care in the persons employed to maintain it, it burst and flooded adjoining lands. There was no proof of negligence in employing unskillful agents. A majority of the court (MELLOR, J., and COCKBURN, C. J.) held the defendant not liable. BLACKBURN, J., dissented. MELLOR, J., places the exemption from liability on the ground that the statute in this case did not impose an absolute duty to maintain the sluice, but that the real duty imposed on the trustees was *bona fide* to employ such agents as they believed to be skillful. He assumes the corporate liability for violation of corporate duty in all cases, irrespective of the objects of the corporation, and classifies the cases maintaining the liability of trustees for public purposes as follows: (1) Individual liabilities, where trustees exceed or abuse powers; *i. e.*, where the wrongful act is individual and not corporate, the individual and not the corporation is liable. (2) Where a duty imposed on trustees has been violated by reason of orders given by them for doing the acts from which damage resulted, *i. e.*, liability follows when the negligence is strictly corporate negligence and not the collateral negligence of servants. (3) Where trustees are authorized to maintain works of a trading character, *i. e.*, works to be supported by selling the right to use them—in their nature a substitution on a large scale for

individual enterprise—in such cases although the *quasi* corporation is organized for public purposes, yet its corporate liability is not confined to negligence resulting from its direct corporate act, but includes negligence resulting from conduct of its servants; apparently on the ground that the duties imposed by statute on such *quasi* corporation towards the persons to whom it sells the use of the works it is authorized to maintain, cannot be distinguished from those of a railroad or canal company in dealing with those who purchase the use of their works; and is not affected by the charitable object of the corporation. There is no such element of trading use in the works maintained by the defendant. COCKBURN, C. J., places the exemption from liability on the ground that the negligence complained of is that of servants only. And also that upon proper construction of the statute under which the trustees act, there is no fund at their disposal for the payment of damages resulting from negligence, and that it is absurd to hold that an action will lie where judgment cannot possibly be satisfied. BLACKBURN, J., dissents, and holds that the defendant is liable on the ground that the jury has found that the injury was in fact caused by want of due care on the part of the defendant in maintaining the sluice. The question whether such a corporation is liable not only for its direct corporate negligence, but also for the negligence of its servants, does not arise. The verdict of the jury that the negligence was the corporate negligence of defendant is conclusive. In referring to the cases which hold that trustees for public purposes are exempt from liability where there has been no direct corporate negligence, but the only negligence is due to the wrongful conduct of persons to whom they stand in the relation of master and servant, he says: "These decisions, or at least the greater part of them, might be supported on the ground that the relation of master and servant did not exist . . . ; but this explanation does not apply to *Holliday v. St. Leonard's*, the *ratio decidendi* of which seems to me to express that there is an exception from the general rule that masters are responsible for the negligent acts of their servants, when the master falls within the class somewhat indefinitely styled trustees for public purposes; but the doctrine in question has, as it seems to me, no bearing on the present case, since the drainage commissioners are not sought to be charged for the collateral negligence of their servants, but for the nonfulfillment of a duty which was, it is alleged, imposed by Act of Parliament on the drainage commissioners themselves." He also holds that the question raised by COCKBURN, C. J., as to the power of the trustees to apply the funds in their control to the payment of damages, does not arise in the case, and is not sufficient ground to deny the right of the plaintiff to a judgment.

An appeal was taken from the judgment of the majority of the court to the Exchequer Chamber. In that court the appeal was held to await

the decision in *Mersey Docks v. Gibbs*, then pending before the House of Lords, and after the decision in that case was announced, the judgment of the Court of Queen's Bench was reversed on the grounds stated in the dissenting opinion of BLACKBURN, J., as delivered in the court below. *Coe v. Wise*, 5 B. & S. 540.

In 1866, *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93, was decided. The Mersey Docks Trustees were a corporate body created by Act of Parliament, charged with the care of the Liverpool docks, and with the collection of the rates levied for their use; the funds so collected, after defraying the expenses of maintenance, were to be applied to the payment of debts incurred in construction, with a view to the reduction of the rates. The purpose was public, and the motive was charitable. Two actions were brought against the trustees by owners of vessels injured in entering the docks. The wrong charged in each action was that the trustees, knowing the entrance of the dock to be unfit for use, neglected to repair it and knowingly suffered it to continue in a condition unfit for use while it was used by vessels with their permission. Judgments were given against the trustees. Upon appeal to the House of Lords, the two cases were heard as one, and the judgments below were sustained. In the House of Lords the unanimous opinion of the common-law judges was submitted by BLACKBURN, J., and was adopted by the House as the ground of its decision. This is the leading and best-considered English case on the subject; but to understand the bearing of the opinion it must be read in connection with the opinions of MELLOR and BLACKBURN, JJ., in *Coe v. Wise*. The judges of the Queen's Bench, who had differed in the latter case, agreed in the opinion in *Mersey Docks v. Gibbs*, and that opinion, as given by BLACKBURN, J., is plainly drawn on the lines of the opinion of MELLOR, J., as well as of his own dissenting opinion in *Coe v. Wise*. And immediately after the decision of *Mersey Docks v. Gibbs*, the same judges who had participated in that decision (except the judges of Queen's Bench), sitting as judges of the Exchequer Chamber, reversed the judgment of the Queen's Bench in *Coe v. Wise*, on the grounds of the dissenting opinion of BLACKBURN, J., and in the course of the argument, ERLE, C. J., affirmed the authority of the decision in *Holliday v. St. Leonard's* which had been discussed and not dissented from in *Mersey Docks v. Gibbs*. Only by considering the two cases of *Coe v. Wise* and *Mersey Docks v. Gibbs* together, can we ascertain the true bearing of the opinion in the latter case.

The precise questions presented and answered are: Was the duty imposed on the trustees an absolute duty to maintain the docks in a state fit for use? Can the trustees be guilty of negligence without actual knowledge that the docks are unfit for use? Both are answered in the affirmative. In answering the first question the court holds that the rule of corporate duty and liability laid down in *Lancaster Canal Co. v.*

Parnaby depends on the nature of the corporate powers and duties, and not on the fiduciary or beneficial purpose of the corporation; and these powers and duties must be determined upon a true interpretation of the statute creating it. When the legislature imposes on trustees for public purposes the duty of maintaining works by trading in their use so that they are in their very nature a substitution for private enterprise, it will be presumed, in the absence of something to show the contrary, that the legislature intends "that the body created by statute shall have the same duties, and its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing." And so in this case the legislature intended to impose upon the trustees the absolute duty of maintenance to the same extent as the general law imposes such duty on an individual carrying on a similar enterprise. In answering the second question the court holds that although the duty of keeping the dock in a fit state for use could be performed by a corporate body only through servants, yet if the corporation had means of knowing by its servants that the dock was in an unfit state and were negligently ignorant of its state, such negligent ignorance is the neglect of the corporation. In one of these actions the fact of such corporate negligence is admitted by the demurrer, in the other it is found by the jury. The question whether the negligence of the persons actually in charge of the docks was only the collateral negligence of the servants of the corporation, and whether a charitable corporation is liable for the collateral negligence of its servants, is not involved in the decision.

The trustees, however, while not admitting the rule of construction adopted by the court as determining their duty and liability, mainly relied on the broader claim that such bodies as theirs are, by the general law of the country, trustees for public purposes, and being such, they are not in their corporate capacity liable for damages caused by the neglect of their servants to perform the duties imposed on the corporation; or, at all events, that the duty of such corporations is limited to due care in the choice of officers, and such care being exercised, redress must be sought against the officers alone.

The court treats this claim elaborately and holds that it has no foundation in law; that the cases supporting the principle that one who is a public officer, in the sense that he is a servant of the government and as such manages some branch of government business, is not responsible for the negligence of those in the same employment, have no application, because they are decided on the ground that the government is the principal and the public officer its servant, and therefore not liable on general principles of the law of agency. (This principle is laid down by Story in his work on Agency, § 313.) Here the defendants are not servants of the public in that sense. That the class of cases cited, which depends

on the principle that when the legislature directs a thing to be done and damage results merely from doing that thing, the person acting under such authority is not liable, but compensation can be recovered only under special provisions of the statute legalizing the wrong, has no application. That the cases apparently bearing in favor of the defendant's claim were decided either on the ground that the injury was caused by a person not standing in relation of servant to the defendant, or upon the ground that in the case of corporations organized to carry on an enterprise in the nature of a public charity, there is an exception to the rule making a master liable for the collateral negligence of his servant. That in such a case as the present the liability does not depend on the relation of master and servant, but on the existence of a corporate duty and the liability for a direct corporate negligence in the failure to perform that duty. *Duncan v. Findlater* was properly decided on the ground that the relation of master and servant did not in fact exist, and this was all that was actually decided; the *dictum* of Lord COTTENHAM, that in no case can such a body be liable for negligence in its corporate capacity, has been rejected in subsequent cases, and is unfounded in law. While much that was said in the judgment in *Holliday v. St. Leonard's*, is based on the opinion of Lord COTTENHAM in *Duncan v. Findlater*, and open to the same objections, does not support that *dictum*; but the point actually decided was that there is an exception from the general law making a master liable for the negligence of his servant where the servant is employed by a public body—this point which the case decides, does not now arise. And the court significantly says: "It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work." In the case of the latter liability, *i. e.*, the liability of a master for the collateral negligence of his servant, it has been decided that there is an exception from the general law when the servant is employed by a public body, and that point does not arise in this case; in respect to the former liability, *i. e.*, the liability of a corporation for corporate neglect in the performance of a corporate duty, there is no case which decides there is an exception from all liability in favor of public or charitable associations; and the *dictum* of Lord COTTENHAM in *Duncan v. Findlater* is not law.

Levingston v. Guardians of Lurgan Union, 2 I. R. C. L. 202, decided in Ireland in 1868, is of interest as showing one bearing given to the decision in the above cases at the time. The action was against the Poor Law Guardians in their corporate capacity. It was held that where a corporation or public trustees acting gratuitously for public purposes, cause damage by a tortious act without having funds with which to

compensate the party injured, they are responsible in their corporate capacity. WHITSIDE, C. J., says (page 219): "Upon the ultimate decisions in these two cases, *The Mersey Dock Trustees v. Gibbs*, and *Coe v. Wise*, it must, I think, be now taken as established: First, that unless the provisions of the legislature, by express enactment, or necessary implication, otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation, or public trustees acting gratuitously for public purposes; secondly, that they are not exempted by the legislature from this liability, because the legislative provisions which regulate them do not provide funds out of which damages recovered in an action against them can be paid, or because these provisions specially apply their funds to purposes not including the payment of such damages; and, thirdly (what indeed may be considered as, in principle, comprised in the second proposition), that this liability subsists, although no property, whether provided by Act of Parliament, or otherwise, be shown to exist, liable to execution upon a judgment."

In 1871, the Court of Queen's Bench in the case of *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214, undertook to overrule the decision of the Court of Common Pleas in *Holliday v. St. Leonard's*. The opinion is given by BLACKBURN, J., and he says that *Holliday v. St. Leonard's*, as an authority for the principle that there is an exception to the rule of *respondeat superior* when the servant is employed by a corporation for public or charitable purposes, was overruled by the decision of the House of Lords in *Mersey Docks v. Gibbs*; forgetting that in the opinion in that case delivered by himself, and in which the Chief Justice of the Court of Common Pleas who delivered the opinion in *Holliday v. St. Leonard's* concurred, he said that the point decided in the latter case "does not arise in the present case, so that it is unnecessary directly to decide anything upon it." *Foreman v. Mayor of Canterbury* is not a well-considered case on this point; indeed the point is not at all discussed on principle, and the decision rests wholly on an assumption of the action of the House of Lords which the record proves to be untrue. The authority of *Holliday v. St. Leonard's* on this point was distinctly and carefully left unquestioned, both in *Mersey Docks v. Gibbs*, and in *Coe v. Wise*. The most that can be said is that in *Foreman v. Canterbury* the Court of Queen's Bench differs from the Court of Common Pleas; the influence of the decision, however, is to be plainly noticed in subsequent cases.

In *Queen v. Williams*, 9 App. Cas. 418, decided in 1884, the rule in *Mersey Docks v. Gibbs*, was applied where similar powers and duties had been given by Act of Parliament to the executive government of New Zealand. The action was brought under authority of the Crown Suits Acts of 1881.

In *Gilbert v. Trinity House*, L. R. 17 Q. B. D. 795; decided in 1886, the defendant was a private guild or corporation, established some 500 years ago for charitable and public purposes, such as the relief of the poor, maintenance of religious services, promotion of the interests of mariners, etc. In very early days when beacons along the coast were mainly private property, it undertook their maintenance, at first perhaps as a charity, and gradually acquired rights and powers to collect tolls; such funds, however, were devoted wholly to the original charity and relief of poor mariners. Under recent statutes the powers and duties of the corporation in reference to lighthouses and beacons were largely increased. The corporation was sued for damages caused by negligence in the removal of a beacon, leaving a portion of it under water. The broad claim made in behalf of trustees for public purposes in former cases, was again made in behalf of this private corporation. The question was, "are the defendants liable to be sued at all in respect of injuries caused by reason of the negligent condition in which beacons, or the remains of beacons, vested in them, are kept?" The court held that the recent legislation enlarging the powers of the defendant, did not make it an agent or servant of the government, or alter the character of the corporation; it remained a private corporation as before. The principle of *Mersey Docks v. Gibbs* was applied to this corporation, and stated more broadly and with less discrimination than it was stated in that case twenty years before. DAY, J., says: "The law is plain that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money as a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether a person is guilty of negligence by himself or by his servants. If he elects to perform the duties by his servants, if in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own."

The English rule was recently (1890) applied in New Brunswick to trustees incorporated for the maintenance of a public hospital. *Donaldson v. The Commissioners of the General Public Hospital in St. John*, 30 N. B. 279. The action was for injury caused to a person admitted to the hospital, by negligent failure to supply the necessary medical and surgical attention. The questions were raised by a demurrer to the declaration. The court held that the duty the defendant owed the plaintiff, as alleged, was admitted by the demurrer, and a breach of that duty by the negligent failure to supply any medical or surgical attendance which he had the right to have supplied, was also admitted;

and therefore the claim that the duty imposed on the defendant was in fact fulfilled by exercising due care in selection of physicians, and in having necessary appliances, etc., was not in the case; for such facts, if they are an answer, should be set forth by way of plea. That admitting the defendant to be a public charitable institution, that fact does not exempt it from this action for negligence; a public charitable institution is liable to be sued for negligence.

The first case in the United States to which our attention has been called, was decided in Virginia in 1867. *City of Richmond v. Long's Adm'rs*, 17 Grat. 375. It was an action for the value of a slave lost by negligence on the part of servants of a hospital. Liability was denied on the ground that the managers of the hospital exercised governmental powers; that under the Virginia laws the managers of the hospital were exercising governmental powers, and the government was the principal or master, and therefore the rule of *respondeat superior* did not apply.

Maxmilian v. Mayor, etc., 62 New York, 160 (1875), was an action against the city. The only question decided was that under the New York statute the Commissioners of Public Charities were not the agents or servants of the city, and therefore the city was not responsible for the negligence of a servant employed by the commissioners.

McDonald v. Massachusetts General Hospital, 120 Mass. 432, was decided in 1876. It was an action against the hospital for negligent surgical treatment. The court distinctly held that a hospital, being a public charitable institution, is not liable for the negligence of a servant when it has exercised proper care in his selection. But the *ratio decidendi* is not entirely clear; apparently the decision is based on the authority of *Holliday v. St. Leonard's*, and if so, it is an authority for the principle that there is an exception to the rule of *respondeat superior*, when the negligent servant is employed by a public charitable corporation. Subsequently a similar question arose in *Benton v. Trustees of City Hospital of Boston*, 140 Mass. 13. The accident was caused by the negligence of the superintendent of a building owned by the city of Boston and used as a hospital under the management of corporate trustees appointed by the city. The court said that if the trustees could be regarded as trustees of a public charity, the case came within *McDonald v. Massachusetts General Hospital*; but held that under the statute incorporating them, the trustees were agents for the city, that the city in the performance of the duty of maintaining the hospital was not liable for negligence, because the case came within the principle of *Hill v. City of Boston*, 122 Mass. 344, where Judge GRAY, in an elaborate opinion and exhaustive review of the cases, defended the Massachusetts doctrine of non-liability of municipal corporations; and also of *Tindly v. City of Salem*, 137 Mass. 171, which somewhat extends that doctrine. And in *Don-*

nelly v. Boston Catholic Cemetery Asso., 146 Mass. 163, the court states that *McDonald v. Massachusetts General Hospital* was decided on the ground "that the defendant was a public charitable institution under the laws of the Commonwealth;" and *Benton v. Trustees of Boston City Hospital* on the ground that the real duty was imposed by statute on the city for public benefit, that the city would not be liable under the rule stated in *Tindly v. Salem* and *Hill v. Boston*, and therefore a mere statutory agent without property, intervening between the city and the actual wrongdoer, was free from liability.

In 1880, the question came up in Rhode Island, in *Glavin v. Rhode Island Hospital*, 12 R. I. 411. The plaintiff claimed damages, first on the ground of negligence of the corporation in the selection of an interne who was employed as a surgeon, and to whose surgical care the plaintiff was committed. The court held that the defendant was liable for its corporate negligence in the selection of its physicians. Second, on the ground of the negligence of the interne, while acting as a surgeon, in his careless and unskillful treatment of the plaintiff. The court held that the defendant was not liable on this ground; that the hospital does not undertake to treat the patient through the agency of the surgeon, but only to procure his services, and therefore the relation of master and servant does not exist, and the hospital is only liable for a breach of its duty to use proper care in the selection of the surgeon. Third, on the ground that the plaintiff, being in a critical condition, it was the duty of the interne, under a hospital rule, to send immediately for an attending surgeon, and the duty of the corporation, under a special provision of its charter, to put the rule in execution. The court held that, while the interne acts as surgeon and when so acting, he may not be the servant of the corporation, yet he also is appointed to perform other duties, and when acting in such capacity the relation of master and servant exists; that the corporation undertakes in critical cases to send for one of its staff of surgeons; this duty is imposed upon it in pursuance of the special terms of its charter, and can only be performed by the corporation through an agent; the interne is its agent for that purpose, and his neglect is that of the corporation, and for such neglect the defendant is liable. The broad claim was also made that the defendant, by reason of being a public charitable corporation, was exempt from all liability. The court held that this broad claim was not supported by any cases cited—discussing the English and Massachusetts cases; that the theory of a public policy which forbids the use of corporate funds in any case to compensate for injuries inflicted, is not sound; there is no such public policy, and the establishment of such a policy is a question for the legislature; that the theory that the corporate funds are trust funds and their use to pay a judgment would be a violation of trust is unsound; that the result of

the English cases is: (a) Where there is a duty, there is a *prima facie* liability for neglect; and a corporation being created for certain purposes which cannot be executed without the use of care or skill, it becomes the duty of the corporation to exercise such care, and funds acquired for the purposes of its creation will be applied to satisfy a judgment for its default in this respect. (b) The corporate funds can be applied notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them; that these rules for corporations for public purposes apply equally to corporations like the Rhode Island hospital.

Fire Insurance Patrol v. Boyd, 120 Pa. St. 624, was decided in 1888. This was an action against a corporation organized to aid the city government of Philadelphia in preservation of life and property at fires, for an injury caused by the negligence of its servants employed at a fire. The court held that under the laws of Pennsylvania the defendant, in the performance of its duties, was acting in aid of the municipal government in the performance of a governmental duty, and in such case the rule of *respondeat superior* has no application; for the state and not the defendant is the superior. The court further held that the funds of a public charity cannot be taken to compensate injuries by negligence of agents, and says: "It would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length. That doctrine is at best, as I once before observed, a hard rule."

In 1891, the question was somewhat discussed in the New York Court of Common Pleas, in *Harris v. The Woman's Hospital*, 27 Abb. N. C. 37. But the case was decided on questions of fact; no actual negligence or want of care was found on the part of the hospital authorities, the surgeons or the nurse.

During the past year the question has arisen in three cases. In Kentucky, in the case of *Williams v. Louisville Industrial School*, 23 L. R. A. 200, where the liability of the defendant for injuries committed by its agents was denied, on the sole ground that this corporation was a mere agent of the State exercising governmental functions. In Michigan, in *Downs v. Harper*, reported in 25 L. R. A. 602, a hospital for the insane was sued by the representatives of a patient who had escaped from the strong room of the hospital, jumped from a window, and so was killed. The negligence alleged was that of the trustees in the construction of the building, and of the employes in the care of the patient. Judgment was given for the defendant. Perhaps the decision might be sustained on other grounds, but the reasoning of the court fairly tends to support the extreme claim of the defendant in this case. There is, however, a distinction that may have strongly influenced the language of the court. The Harper Hospital was originally a private foundation by deed conveying property to trustees on a specific trust; these

trustees were subsequently incorporated under a general statute. It is possible that by the Act of incorporation the corporate powers were limited to administration of the original trust in accordance with the laws established by the founders; if this were so, the corporate capacity would be reduced to the minimum, and the defendant might be held not liable upon a construction of the terms of its charter, without questioning the liability of an eleemosynary corporation for injuries committed in pursuance of its corporate powers.

The case of *Union Pacific Ry. Co. v. Artist*, 60 Fed. Rep. 365, decided by the United States Circuit Court of Appeals, does not deal at all with the relation of a corporation, whether business or eleemosynary, to its corporate funds, nor directly with the nature of the duties imposed on a public or charitable corporation by its charter; the only question considered or decided in respect to a corporation is, that any corporation, when it undertakes an act of charity not within the purposes of its incorporation and which it is under no legal obligation to perform, assumes the same personal duties, neither more nor less, than an individual assumes who undertakes a similar act of charity; and that a corporation in administering a trust fund distinct from its corporate funds, held by it on a specific trust, stands in the same position as an individual who administers a trust fund for a similar purpose. But the case is of peculiar interest as maintaining the proposition that an individual establishing hospital accommodations as a charity, undertakes no duty towards those who accept them as a free gift, except the duty of using reasonable care in providing such accommodations; and that if one is injured through negligence, not of the individual in the performance of his personal duty, but of the servants employed by him, the principal is not liable, because such case does not come within the reason of the rule of *respondeat superior*, and such rule has no application. As this proposition is true of a corporation as well as of an individual, the court held that the railroad corporation which had established hospital accommodations as such a charity, was not liable in a suit to recover for injuries caused through the negligence of the servants it had employed; that the doctrine of *respondeat superior* has no just application, and "it was responsible for the discharge of its own personal duty, and not for the performance of the duties of its employés." This is the most direct application we have found in an American case of the doctrine which in *Hall v. Smith* and *Holiday v. St. Leonard's* was applied to corporations established for public and charitable purposes.

It is apparent that there are marked differences in these cases, both as to results and the process by which results are reached. These differences mainly appear in the tests adopted for ascertaining in each case what is a corporate duty and what is a corporate neglect; in the con-

fusion of the *quasi* trust arising from the restriction which binds every corporation to apply its corporate funds to the purposes for which it was organized, with the relation of a strictly legal trustee to his trust funds; and especially in the various means by which courts have sought to escape the patent injustice of applying the extreme doctrine of *respondeat superior* to the personal defaults of employes of charitable institutions. But we think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant, and not caused by its corporate negligence, in the failure to perform a duty imposed on it by law; and we are satisfied that this general conviction rests on sound legal principles.

The law which makes one responsible for his own act, although it may be done through another, and which is expressed by the primary meaning of the maxim, *qui facit per alium facit per se*, is based on a principle of universal justice. The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy.

The liability of a charitable corporation for the defaults of its servants must depend upon the reasons of that rule of policy, and their application to such a corporation. The rule is distinguished as the doctrine of "*respondeat superior*;" although that phrase is used broadly in reference to any relation of principal and agent, thereby causing much confusion. Here we use it in the narrow meaning suggested by its origin. The phrase is taken from the words of the Statute of Westminster Second, Charles II.: "*Si custos gaolæ non habeat per quod iusticietur vel unde solvat, respondeat superior suus qui custodiam hujus modi gaolæ sibi commisit.*" As Lord COKE tells us (2 Inst. 382), this law was intended only for those who "having the custody of gaols of freehold or inheritance commit the same to another that is not sufficient." As sheriffs originally profited through the appointment of their sub-officers, the rule of the statute was applied to sheriffs, although they were not included in its letter. This statute was passed before the first Year Book was kept, at a time when the English law was "without form." It recognized an injustice, and declared a rule of public policy, *i. e.*, an injury done by one who is irresponsible must be answered for by his superior, when for his own convenience and emolument that superior has given the wrongdoer the opportunity of committing the injury. This rule of public policy modified the development of the law of master and servant from the beginning, and in this way infused into the law of agency a sort of fictitious agency depending not on the principle of justice that makes one responsible for his own act, but on a rule of public policy which under certain circumstances estops one from showing that the act in question was not his own. This view is suggested by

the opinion of BEST, C. J., in *Hall v. Smith*, *supra*, and is the occasion of his emphatic declaration that "*respondeat superior*" is bottomed on the principle that he who expects to derive the advantage from an act done for him by another, must answer for any injury which a third person sustains from it.

The reasons for the rule have been differently stated by others. In *Maxmilian v. Mayor, etc.*, *supra*, the rule is based upon the right which the employer has to select his servants, to discharge them if not competent, and to control them while in his employ.

In Dicey on Parties to Actions, Rule 102, 445, the liability is stated as "analogous to the liability of an owner for injuries committed by animals belonging to him. Neither the master nor owner is liable because he has himself done the particular act complained of. He is responsible because the wrong is the result of his having in the one case employed the incompetent servant, and in the other kept an animal of habits injurious to his neighbors." Here the policy stated seems to be that the master should not only be liable for his negligence in the employment of servants, but should be held as a guarantor that none employed by him should abuse their opportunities. And a similar notion is expressed in Wood on Master and Servant, § 277, *i. e.*, that the penalty of liability is imposed in order to secure in the master "the exercise of proper care and diligence in the selection and retention of his agents." Wharton, Law of Negligence, § 157, gives as the reason of the policy, that "he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts;" relying on Lord BROUGHAM's statement in *Duncan v. Findlater*, "I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

This defendant does not come within the main reason for the rule of public policy which supports the doctrine of *respondeat superior*; it derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule. Again, so far as the persons injured are concerned, especially if they be patients at the hospital, the defendant does not "set the whole thing in motion" in the sense in which that phrase is used as expressing a reason for the rule. Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party, a stranger to the transaction—he is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public; surely, those who accept the benefit,

contributing also by their payments to the public enterprise (and not to the private pocket of the defendant), assist as truly as the defendant in setting the whole thing in motion.

But the practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned.

We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule and to declare a new public policy and say: On the whole substantial justice is best served by making the owners of a public charity, involving no private profit, responsible, not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the rule of *respondeat superior*. It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule; or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant—whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty—is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong.

This result is justified by the opinions in *Hall v. Smith*, *Holliday v. St. Leonard's*, and *Union Pac. Ry. Co. v. Artist*, *supra*, substantially on the grounds above stated; and is reached, for one reason or another, by the greater number of courts that have dealt with this particular liability of a corporation for public or charitable purposes.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

HORDERN V. SALVATION ARMY.

(199 New York, 233.—1910.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, which affirmed a judgment entered on a nonsuit at trial term.

CULLEN, C. J. The action was brought to recover for personal injuries received by the plaintiff, a journeyman mechanic, who was engaged in making repairs on a boiler on defendant's premises. The accident occurred through the defective condition of a runway or staging leading from a door in the boiler room. It is unnecessary to narrate the details of the occurrence. The learned court below was of the opinion that the runway was not of such a character as to warrant an inference of negligence on the part of the defendant in maintaining it. It is sufficient to say that, while it may be conceded that the case is a close one, we are of the opinion that the evidence presented a question of fact for determination by the jury. This statement brings us to the principal question of law presented on this appeal.

The respondent contends that, being a religious or charitable corporation, it cannot be held liable for the torts or negligence of its agents or servants. In other words, that the rule of *respondeat superior* has no application to such a corporation. That such immunity exists in certain cases is conceded in every jurisdiction so far as our research goes, and in many jurisdictions the immunity is unqualified, existing in all cases, but the extent of the immunity and the grounds on which it rests are the subject of very diverse judicial views. Where the doctrine that the immunity is universal obtains, it is rested on the proposition that the funds of the corporation are the subject of a charitable trust, and that to suffer a judgment to be recovered against the corporation and to subject its property to the judgment would be an illegal diversion and waste of the trust estate. This doctrine has been asserted in Pennsylvania, *Fire Ins. Patrol v. Boyd*, 120 Pa. 624; Maryland, *Perry v. House of Refuge*, 63 Md. 20; Tennessee, *Abston v. Waldon Academy*, 118 Tenn. 24; Kentucky, *Williamson v. Louisville School*, 95 Ky. 251; Illinois, *Parks v. Northwestern University*, 218 Ill. 385; and Missouri, *Adams v. University Hospital*, 122 Mo. App. 675. It is true that in several of these cases the same decision might have been reached on other grounds—grounds of exemption which seem to be recognized everywhere—but the ground on which the learned courts before whom the cases came placed their decisions was the one stated, viz., the general immunity of charitable corporations for the torts of their agents. In Massachusetts

the exemption of certain hospitals from liability seems by the opinions of the Supreme Court to have been based rather on the theory that those institutions were governmental instrumentalities than on their character as public charities, though they were recognized as such. *McDonald v. Boston Gen. Hospital*, 120 Mass. 432; *Benton v. Trustees of City Hospital*, 140 Mass. 13. In the earlier case the plaintiff was a gratuitous patient seeking to recover for negligence of the defendant's employé. In the second the plaintiff, a visitor to a patient in the hospital, sought to recover for injuries sustained in the hospital through the unsafe condition of the stairs. At the same time the Supreme Court held a religious corporation liable to a workman engaged in painting the ceiling of a church, for defective staging, *Mulcahy v. Religious Soc'y*, 125 Mass. 487, and a similar society liable to a person invited on the premises for their defective condition, *Davis v. Congregational Church*, 129 Mass. 367, and still another liable to a traveler on the highway, for having suffered snow to fall upon him from the roof of the church. *Smethurst v. Barton, etc., Church*, 148 Mass. 261. But in *Farrigan v. Pevear*, 193 Mass. 147, the same court held that the trustees of an unincorporated charity for the education and maintenance of indigent boys were not liable for the injuries caused by their servants, if they used proper care in their selection, stating that the *Davis* and *Smethurst Cases* were not controlling, because the question of the exemption from liability by reason of the charitable character of the defendants was raised in neither case. Whether since this last decision Massachusetts is to be placed in the class of states adhering to the doctrine of total immunity may well be doubted. Certainly liability for negligence in the selection of servants may impair the integrity of the trust estate just the same as liability for the negligence of servants, though of course not so frequently.

In several jurisdictions, however, the immunity of charitable corporations for the torts of their trustees or servants has been made dependent on the relation the plaintiff bore to the corporation. In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state. *Collins v. N. Y. Post Graduate Med. School*, 59 App. Div. 63; *Joel v. Woman's Hospital*, 89 Hun, 73. See, also, *Pryor v. Hospital*, 15 N. Y. Supp. 622, note, and *Haas v. Missionary Soc.*, 6 Misc. Rep. 281. It is also the law in this state that there is similar immunity from liability in the case of a charitable institution of a *quasi* penal character as against an inmate committed to it for punishment or reformation. *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16. That decision proceeded on the ground that the defendant was engaged in the performance of a governmental duty for the benefit of the state in respect to persons committed to its custody and possessed the same immunity as the state. The principle of this

case is very much akin to that on which the early hospital cases in Massachusetts were decided. On the other hand, in *Rector, etc., of Church of Ascension v. Buckhart*, 3 Hill, 193, a recovery against a religious corporation by a person injured by the falling of a church wall was upheld. The authority of this case has never been questioned, and the decision is conclusive against the doctrine of total immunity. In *Blaechinska v. Howard Mission, etc.*, 56 Hun, 322, reversed, 130 N. Y. 497, but on another point, a recovery was had against a charitable organization for the maintenance of a vault under a sidewalk, with a defective cover, but no question seems to have been raised as to the immunity of the defendant on account of its charitable character. These seem to be the only cases in this state bearing on the question before us. In at least two other states the doctrine of total immunity has been rejected. In *Hewett v. Women's Hospital*, 73 N. H. 556, a recovery by a nurse for failure to warn her against the presence of a contagious disease was upheld. In *Bruce v. Cent. Methodist Ep. Church*, 147 Mich. 230, the defendant was held liable to a workman employed in painting the church for defective scaffolding.

So much for authority. If, however, we are to consider the question of the liability of the defendant an open one despite the decision in *Rector, etc., of Church of Ascension v. Buckhart, supra*, we feel clear that on reason and principle the defendant's claim of immunity should not prevail. In the case of *Powers v. Mass. Homœopathic Hospital*, 109 Fed. 294, and in the case we have cited from the courts of Michigan, there will be found not only an elaborate review of the authorities, but an exhaustive discussion of the grounds on which the claim of universal immunity is sought to be sustained. In the earlier case Judge LOWELL, of the United States Circuit Court, shows that the analogy of the immunity of private trust estates does not support the doctrine. That immunity is only nominal, not real. "It is true that a suit cannot be maintained against a trustee as such for torts committed in the management of the trust property. The suit is brought against the trustee as an individual. The judgment and execution run against him individually. When these are satisfied, however, the trustee is reimbursed from the trust estate, unless individually at fault. *Shepard v. Creamer*, 160 Mass. 496; *Baker v. Tibbetts*, 162 Mass. 468; *Benett v. Wyndham*, 4 De Gex, F. & J. 259. The trust fund is protected from immediate levy to satisfy the execution, not because of its complete immunity, but rather from technical reasons connected with the legal estate of the trustee in the property. Its technical immunity affords it no ultimate protection." Of the exemption of charitable institutions against the recipients of the charity the learned judge said: "One who accepts either the benefit of public or private charity enters into a relation which exempts the benefactor from liability for the negligence of his servants

in administering the charity; at any rate, if the benefactor has used due care in selecting those servants, * * * it would be intolerable that a good Samaritan who takes to his home a wounded stranger for surgical care should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. * * * If in their dealings with their property appropriated to charity they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risk of malpractice, if their charitable agents have been carefully selected." In the later case Judge CARPENTER, of the Supreme Court of Michigan, after pointing out that in the earlier decisions in that state immunity only as against beneficiaries of the charity was involved, said: "I see no ground on which it may be held that the rights of these who are not beneficiaries of the trust can in any way be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trust justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity." We can add nothing to the force of this reasoning, but simply express our concurrence therein, as well as in the argument of Judge LOWELL.

To avoid misapprehension, it may be well to say that we do not intimate any view as to the status of persons visiting charity patients and received through the courtesy of the charitable institution—whether

there would be any greater liability to such persons than to the patients themselves. In this case plaintiff bore the same relation to the defendant as he would bear to any other owner of property on whose premises he was called to work.

The judgments of the Appellate Division and Trial Term should be reversed and a new trial granted, costs to abide the event.

GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

*Judgment reversed, etc.*¹

¹ See, also, *Kellogg v. Church Charity Foundation*, 128 App. Div. 214; *Gartland v. N. Y. Zoological Society*, 135 App. Div. 163.

MASTER AND SERVANT.

(a) MASTER TO THIRD PERSON.¹

COHEN v. DRY DOCK, ETC., R. R. Co.

(69 New York, 170.—1877.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, reversing a judgment in favor of defendant, entered upon an order nonsuiting plaintiff, and granting a new trial.

This action was brought to recover damages alleged to have been sustained by reason of the negligence of defendant's servant. On April 27, 1872, plaintiff was driving along Catharine street, in the city of New York, in a buggy. He had crossed the track of defendant's road, but before the rear part of the buggy was far enough from the track so that a car could pass without striking it, his further progress was arrested by a blockade of trucks and other vehicles, and he was unable to move

¹ REASON OF THE MASTER'S LIABILITY.—“Blackstone (I. 417) . . . has no other reason to give than the fiction of an ‘implied command.’ It is currently said, *Respondeat superior*; which is a dogmatic statement, not an explanation. It is also said, *Qui facit per alium facit per se*; but this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant ‘in the course of the service,’ are specifically unauthorized or even forbidden. Again, it is said that a master ought to be careful in choosing fit servants; but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well conducted and competent: which is certainly not the law.

“A better account was given by Chief Justice Shaw of Massachusetts (*Farwell v. Boston & Worcester Railroad Co.*, 4 Met. 49). ‘This rule,’ he said, ‘is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it.’ This is, indeed, somewhat too widely expressed, for it does not in terms limit the responsibility to cases where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or the master can be liable where there is no default at all. And the true principle is otherwise clearly enounced. I am answerable for the wrongs of my servant or agent, not because he is authorized by me, or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.” Pollock on Torts, 7th ed., 76.

forward, and by other vehicles he was prevented from moving in any direction. A car approached on defendant's road, the driver of which, as plaintiff testified, after waiting a moment or two, told the plaintiff to "get off the track." The plaintiff asked him to wait until the trucks moved, promising then to move. The driver said, "Damn you, if you don't get off here; I am late; I will get you off some way or other." The plaintiff said, "You wait a moment; I guess the trucks are moving and I may go." The trucks started and as the plaintiff prepared to move on, the driver started his horses and the platform of the car struck the hind wheels of the buggy and overturned it, thus causing the injury complained of.

Defendant's counsel moved for a nonsuit on the ground, among others, that the car-driver's act was not within the scope of his authority, but was an unlawful and unauthorized act, for which defendant was not responsible.

PER CURIAM. The general rule of law contended for by the appellant, that a master cannot be held liable for the wilful, intentional and malicious act of his servant, whereby injury is caused to a third person, is not disputed. Many limitations and illustrations of the rule will be found in reported cases, and it is not always easy to apply the rule. It has recently been under consideration in this court in the case of *Rounds v. The Delaware Lack. & Western R. R. Co.*, 64 N. Y. 129, and in the opinion of ANDREWS, J., in that case, is found a very thorough and satisfactory consideration of the rule and the principles upon which it is founded. The general principles there announced are as follows: To make a master liable for the wrongful act of a servant to the injury of a third person, it is not necessary to show that he expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority, and this, although he departed from private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury. While the master is not responsible for the wilful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders; if the servant is authorized to use force against another, when necessary, in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant uses more force than is necessary, the master is liable.

The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances of the occasion, goes

beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.

The master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. But if the servant, under the guise and cover of executing his master's orders and executing the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury, then the master is not liable.

When it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury not done with a view to the master's service, or for the purpose of executing his orders.

The application of these principles to the facts of this case leaves no doubt that the case was properly disposed of by the General Term of the Supreme Court. The driver was driving this car for the defendant, and in its business. As the car could only run upon the railroad track, it was his duty, so far as he reasonably and peaceably could, to overcome obstacles on the track in the way of his car; and in driving his car and overcoming these obstacles, he was acting within the general scope of his authority. If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear, upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and purposes of the driver, and of the character and quality of his acts.

The order must be affirmed and judgment absolute ordered against the defendant with costs.

All concur.

Order affirmed and judgment accordingly.

PALMERI V. THE MANHATTAN RAILWAY CO.

(133 New York, 261.—1892.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action to recover damages for unlawful imprisonment.

GRAY, J. Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police officers, of a person in the railroad station, whom he suspected of being a counterfeiter, and the company was, thereafter, sued for false imprisonment. In that case the facts were, briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. Upon a certain occasion two men came into the station and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police and thought the bill looked "queer;" but, nevertheless, took it and gave back the change with the tickets, saying nothing to them. He then sent for a police officer, to whom he pointed out the men, who were then on the station platform. The bill was subsequently pronounced to be genuine and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment; or such as were demanded for the protection of his employer's interests, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine, and, when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step and could not possibly be considered as something which his employers, or his employment, required of him. I refer to the case of *Mulligan v. New York & Rockaway Beach Ry. Co.*, 129 N. Y. 506. In the present case, however, the acts of the ticket agent were of a different character.

The plaintiff purchased a ticket of the agent at the elevated railroad station and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money and demanded another quarter

in place of the one given him. She insisted upon her money being genuine and refused to give another quarter, or to hand back the change. He became angry and called her a counterfeiter and a common prostitute. He placed his hand upon her and told her not to stir until he had procured a policeman to arrest and to search her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages, because of injury sustained from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words publicly spoken concerning her. The jury believed her story and the judgment, which she has recovered, the appellant seeks to avoid; principally upon the ground that the ticket agent was acting outside of the scope of his employment in doing the acts complained of. The appeal must fail. This is not like the *Mulligan* case. Here the agent was acting for his employers and with no other conceivable motive, losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property, and if, in his conduct, he committed an error which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent, which are done in the prosecution of the business intrusted to him, the carrier becomes civilly liable, if its passengers or strangers, receive injury therefrom. The good faith and motives of the servant are not a defense, if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it, in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases; of which *Weed v. P. R. R. Co.*, 17 N. Y. 362; *Hamilton v. Third Ave. R. R. Co.*, 53 id. 25; *Stewart v. B. & C. R. R. Co.*, 90 id. 588; and *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 id. 117, are sufficient instances.

What materially distinguishes the present from the *Mulligan* case is that there the servant of the company was not acting for the protection of the company's interest; but went quite outside of the line of his duty, to perform a supposed service to the community, by procuring the arrest of criminals, whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business; whereas here the ticket agent clearly was engaged about the company's affairs; but, in the belief of the jury, unlawfully detained the plaintiff and insulted her by slandering her character. It is needless to consider

the case of *Mali v. Lord*, 39 N. Y. 381, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched, upon suspicion of a theft, and whose general employment could not warrant such an act; and the present case of an agent, who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insult are acts in departure from the authority conferred, or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed. Judge ANDREWS in *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129, points out the distinguishing principle of these cases and refers to *Mali v. Lord* in the course of his opinion.

The offer by defendant, upon plaintiff's cross-examination, to show that she was a habitual litigant, was properly excluded. It had nothing to do with the issue, and, if true, would not prove her unworthy of belief; any more than it would follow, from her admission of its truth, that the litigations, which such a tendency had encouraged, were not upon meritorious grounds. The testimony of the witness Murphy, a bystander upon the occasion, as to the ticket agent's conversation with him, I think was admissible as occurring simultaneously and as illustrating somewhat the transaction; but, even if questionable, the defendant appears to have objected to the testimony after it was in, and obtained no ruling by motion to strike out. When, subsequently, upon it appearing to the court that the plaintiff did not hear the conversation an objection to the testimony continuing was made, it was considered proper by the judge and was at once sustained.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

¹ The master is as liable for the wilful, as for the negligent act of his servant, provided the wrongful act was committed in the business of the master, and within the scope of the servant's employment. In the case of a common carrier an apparently greater responsibility must be assumed, but, after all, this is only because the servant or agent engaged in executing the contract of carriage cannot, during the transportation, act without the scope of his employment. "A common carrier is bound, so far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and he undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract." *Stewart v. Brooklyn & Cross-town R. R. Co.*, 90 N. Y. 588, 591. This stringent responsibility, however, is assumed only towards passengers, not strangers, and applies only to such servants as are engaged in the execution of the contract of carriage.

SHEA v. THE SIXTH AVENUE RAILROAD CO.

(62 New York, 180.—1875.)

APPEAL by the defendant from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of the plaintiff, in an action to recover damages for personal injuries. The defendant's demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was sustained and judgment entered dismissing the complaint. On appeal the judgment was reversed, and the demurrer overruled with leave to answer. The defendant failed to answer, and the damages were assessed by a sheriff's jury, and judgment entered thereon.

MILLER, J. The plaintiff's complaint alleges that one of the cars of the defendant was standing at the corner of Barclay and Church streets in New York city, in such a position as to block up the passage across Church street. That the plaintiff being desirous of crossing said street, stepped upon the front platform of said car, for the purpose of passing over the same. That thereupon the driver of said car who was the servant and agent and then in the employment of the defendant, forcibly, willfully, and violently seized the plaintiff, threw her from the said car upon the highway, in consequence of which the leg of the plaintiff was broken, and the plaintiff was otherwise severely bruised and injured.

The averments in the complaint show that the defendant's car blocked up the street, so as to prevent the crossing of the same by foot passengers who might have occasion to pass over. The right of every individual to a free and unrestricted use of a public highway or a street, for the purpose of passing and repassing is well settled. When such a right is obstructed or infringed upon, I think that it is equally clear that a person who desires to pass across the street would have the right either to remove the obstruction, or if necessary to pass over the same.

While there are occasions when it is indispensable for the cars on street railroads to stop at localities on their route, and sometimes necessarily obstruct a free passage across the street, there is no good reason why a person who desires to cross should wait unreasonably long for the cars to pass, or be compelled at some inconvenience to seek another place for that purpose. Such person has an undoubted right to cross over the platform of the car while thus interfering with his passage for the purpose of getting beyond it, and he is not a trespasser or wrongdoer in so doing. To render such an act a trespass would, I think, be in direct conflict with the principle that public highways and streets are

open to all who choose or may desire to use them, and for the benefit of the entire community. The fact that street railroads have rules and regulations, preventing persons from being on the platform, does not I think, interfere with the right to pass over the same. These rules are intended mainly for the passengers who travel in the cars, and have no application to those who merely use them as a means of avoiding the obstructions which they create to the public, when stopping at places on public streets and thoroughfares. If such a right to pass did not exist, it would rest with these companies to determine in their own discretion, when, where, and for what length of time they shall interfere with the travel of the public, and in fact the entire extent of the obstruction which they are at liberty to interpose in this manner.

The plaintiff, then, was lawfully on the car, when the driver seized and threw her from the same, and the question arises whether the act of the driver was one for which the defendant was responsible. It is insisted by the defendant's counsel, that as the defendant gave the driver no express authority to do the act, no authority to do an unlawful act will be presumed, and to sustain this position, reliance is placed upon the case of *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122. In the case cited, it appeared that the plaintiff was a passenger in the defendant's car, and desiring to alight passed out upon the platform, and requested the conductor to stop the car, to which he replied that "the car was stopped enough," she answered that "she would not get out until the car had come to a full stop," whereupon he took her by the shoulder with both hands and threw her out, and her leg was broken, by falling upon the pavement. It was held that the act was a wanton and wilful trespass, not in the performance of any duty to, or of any act authorized by the defendant, and that the defendant was not liable. It is laid down, in the case cited, that if an act is done by a servant in the business of the master, and within the scope of his employment, the master is liable to third persons for abuse of the authority conferred, and injuries resulting from an error of judgment or mistake of facts by the servant, as well as those resulting from a negligent or reckless performance of his duties. It is said in the opinion of the court, that "an act was done by the conductor completely out of the scope of his authority, which there can be no possible ground, warranted by the evidence, for supposing the defendant authorized, and which it never could be right under any circumstances for the defendant to do." Several grounds are stated, showing that the act was not done by the conductor while engaged in the performance of any duty to the defendant, or of any act authorized by it, but that it was a criminal act, a wanton and wilful trespass, and not the natural or necessary consequence of anything which the defendant had ordered to be done.¹

¹ The Court of Appeals, in *Stewart v. Brooklyn & Crosstown R. R. Co.*, 90 N. Y.

The case at bar is not analogous to the case cited, and the rule there laid down has no application here. The demurrer admits all the facts alleged in the complaint, and concedes that the defendant's driver was acting as "the servant and agent, and in the employment of the defendant," when the act complained of was done. It may also be assumed, from his position that the driver had instructions to keep the platform of the car clear from all passengers, as well as all other intruders, who might be there without right and contrary to the regulations of the company. This no doubt was his regular duty, and it was necessarily intrusted to his judgment to decide whether a person was on the platform in violation of the rules of the company, and he was authorized to remove such person. If without comprehending the precise nature of the legal rights of the defendant, or that the obstruction of the street by the stopping of the cars conferred any privilege upon persons who desired to cross, and supposing and believing that the plaintiff had no such right, and was a trespasser unlawfully there, the driver did the act complained of, it was an error of judgment, a mistake committed in the course of his employment, for the consequences of which the defendant is liable. If it was an abuse of authority conferred which induced him to seize and eject the plaintiff, the same rule is applicable. *Isaacs v. Third Ave. R. R. Co.*, *supra*; *Higgins v. Waterliet Turnpike Co.*, 46 N. Y. 23, 29; *Jackson v. Second Ave. R. R. Co.*, 47 id. 274; *Meyer v. Second Ave. R. R. Co.*, 8 Bosw. 305.

The averment in the complaint, that the driver "forcibly, wilfully, and violently, seized the plaintiff, and threw her from the said car," cannot I think be considered as charging that the act was malicious, but it is merely an allegation that he acted knowingly and recklessly, in the performance of his duty, using more force and violence than was necessary to accomplish his purpose, for which as we have seen, within the cases cited, the defendant would be answerable.

The order and judgment of the General Term was right, and must be affirmed with costs.

All concur; except FOLGER, J., dissenting.

Judgment affirmed.

588, 594, offers what may be regarded as an apology for such erroneous decision, saying: "That case (*Isaacs v. Third Ave. R. R. Co.*,) was discussed by counsel and determined by this court upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to that case. The mind of the court was not called to the fact that the rule applicable to such a case does not apply to the case of an assault committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier."

HIGGINS v. THE WESTERN UNION TELEGRAPH CO.

(156 New York, 75.—1898.)

APPEAL by the defendant from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action to recover damages for injuries alleged to have been caused by the negligence of the defendant.

O'BRIEN, J. The plaintiff sustained a personal injury on the 7th day of December, 1891, while engaged in using the elevator in defendant's building at the corner of Broadway and Dey street in the city of New York. The negligent act to which the injury is to be attributed was committed by a general servant of the defendant, whose duty it was to manage and operate the elevator.

The question in this case is whether the defendant is responsible under the doctrine of *respondeat superior* for the negligence of its servant under the circumstances of the case. There is practically no dispute with respect to the facts, and, briefly stated, they are these: It seems that some months before the accident the building referred to was injured by fire, and the company entered into a contract with a contractor and builder to restore the building. The contractor, among other things, was to furnish elevators, and they had been placed in the building some time before the accident. The builder had not, however, yet completed his contract, and had not turned over the elevators to the defendant. They were still, for all practical purposes, the property of the contractor. From the time he first placed them in the building they were subject to his use in carrying materials and workmen from the lower to the upper floors. There can be no doubt that he had the right to use them for that purpose until such time as he should complete his contract and turn the building over to the defendant.

On the day of the accident the plaintiff, a mason or plasterer, was in the service of the contractor, and was directed by him to do some plastering in the elevator shaft. For the purpose of doing this work they used the elevator as a platform, upon which the plaintiff stood. It was necessary to move the elevator up and down to enable the plaintiff to do his work, and the contractor, instead of employing one of his own men for that purpose, found it more convenient and economical to procure a man who was in the employment of the defendant. It should be stated that, although the elevator had not yet been turned over to the defendant, it was, nevertheless, permitted to use them for the purpose of tak-

ing passengers up and down during some portions of the day. On the day of the accident the defendant's servant, who had charge of the elevator for the purpose of carrying passengers, suspended that work about noon, and the contractor, during the rest of the day, used the elevator as a platform for the purpose stated. .

There is no question in this case with respect to the fact that Algar, the person who took charge of the elevator, and whose negligence caused the accident, was in the general service and pay of the defendant; but the question is whether, at the time of the accident, he was engaged in doing the defendant's work or the work of the contractor. The work of plastering the elevator shaft was that of the contractor. Algar, who was called upon by the contractor to move the elevator while the plaintiff was standing upon it, was not at the time taking any orders from the defendant. His orders came from the plaintiff, who was in the employ of the contractor, and who directed him to move the elevator up and down, as it became necessary, to enable him to do the work. The hand of Algar that moved the lever which controlled the elevator was directed by the mind and brain of the plaintiff. To hold the elevator steady it was necessary to bring the lever to the center of the guard and put it in a catch. To move the elevator up or down the lever was taken from the catch and moved forward or backward accordingly. On the occasion of the accident Algar did not put the lever in the catch, and did not have his hand upon the lever, but was sitting in a chair reading a newspaper. It was this negligence which caused the accident, since, without any instructions from the plaintiff to move the car, and without warning, it started up, throwing him down, with his head between the door and the top of the elevator, inflicting injuries of a somewhat serious character.

The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused the injury, and that such person alone is liable. The case of master and servant is an exception to the rule, and the negligence of the servant, while acting within the scope of his employment, is imputable to the master. *Engle v. Eureka Club*, 137 N. Y. 100. But the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrong-doer and the person sought to be charged for the result of the wrong, at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced was, at the time, in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of

another in a particular transaction, and that, too, when their general employer is interested in the work. *Wyllie v. Palmer*, 137 N. Y. 248.

In this case, as already observed, the contractor had the right to use the elevator, and for that purpose could have employed his own servants. Instead of doing so he borrowed the defendant's servant, who, for the time being, became the servant of the contractor, engaged in doing his work and subject to his order. He put the elevator and the conductor to a use different from that employed by the defendant. The defendant used the elevator for the purpose of carrying passengers. The contractor was using it as a platform upon which the plaintiff might stand in doing his work. Now, does the fact that Algar, who was guilty of the negligent act that produced the injury, was in the general employ and pay of the defendant, make it liable for the result of this accident? I think not, and for the reason that the conductor, while moving the elevator up and down as directed by the plaintiff, was not engaged in the defendant's work, but in the work of the contractor.

This distinction in the law of master and servant is made quite clear by the decisions in this court. *Wyllie v. Palmer*, *supra*; *McInerney v. D. & H. C. Co.*, 151 N. Y. 411.

Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master. And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is not to be attributed to the master. Here the relation of master and servant between the conductor of the elevator and the defendant was suspended during the time that he was doing the work of the contractor in moving the plaintiff up and down in the shaft.

I am unable to distinguish this case in principle from the cases in this court already cited; and the best considered cases in other jurisdictions are to the same effect. *Murray v. Currie*, L. R. (6 Com. Pleas) 26; *Rourke v. White Moss Colliery Co.*, L. R. (2 Com. Pleas. Div.) 205. In the latter case Lord COCKBURN stated the rule in these words: "But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

The true test in such cases is to ascertain who directs the movements of the person committing the injury. It seems to me that the conductor in this case, whose negligence caused the injury, was not, at the time, engaged in the defendant's work, but in the work of the contractor, under the direction of the plaintiff. Hence, the decision in this case cannot be

sustained without disturbing the rule of law as determined in the cases cited.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur (PARKER, CH. J., and MARTIN, J., in result), except GRAY and VANN, JJ., not sitting.

Judgment reversed.

MORIER V. ST. PAUL, MINNEAPOLIS & MANITOBA RY. CO.

(31 Minnesota, 351.—1884.)

MITCHELL, J. All the evidence in this case tends to prove that some section-men, under the charge of a section-foreman, were, in the employment of defendant, engaged in repairing its railroad track near defendant's [plaintiff's] farm, on the 21st of October, 1882. While engaged in such work, they usually returned to their boarding-house for dinner, but on this day, their work being at some distance, they took their dinner with them. At noon, when they quit work to eat, they built a fire, or rekindled one which some other person had kindled, on defendant's right of way, for the purpose of warming their coffee. After eating dinner, they resumed their work, negligently leaving the fire unextinguished, which spread in the grass and ran on to plaintiff's land and burned his hay. There is no evidence that the defendant was boarding these men, or that it was any part of its duty to prepare or cook their meals. Neither is there anything tending to show that the defendant either knew of or authorized the kindling of a fire for any such purpose, either on this or on any other occasion. Nor is there any evidence that it was the duty of these section-men to exercise any supervision over the right of way, or to extinguish fires that might be ignited on it. So far as the evidence goes, their employment was exclusively in repairing the railroad track.

The doctrine of the liability of the master for the wrongful acts of his servant is predicated upon the maxims, *respondet superior* and *qui facit per alium facit per se*. In fact, it rests upon the doctrine of agency. Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment? If it be done in the course of and within the scope of the employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. Smith on Master & Serv-

ant, 151. But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was *at the time* engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, *for however short a time*, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thompson on Negligence, 885, 886; Sherman & Redf. on Negligence, §§ 62, 63; Cooley on Torts, 533 *et seq.*; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Storey v. Ashton*, L. R., 4 Q. B. 476; *Mitchell v. Crassweller*, 13 C. B. 237; *McClenaghan v. Brock*, 5 Rich. (Law. 17).

It would seem to follow, as an inevitable conclusion, from this, that on the facts of this case the act of these section-men in building a fire to warm their own dinner was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business, as much as they were when eating their dinner; and were for the time being their own masters, as much as when they ate their breakfast that morning, or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial, in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire, the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment, than would the act of one of these men in lighting his pipe, after eating his dinner, and carelessly throwing the burning match into the grass. See *Williams v. Jones*, 3 Hurl. & C. 256. The fact that the

section-foreman assisted in or even directed the act does not alter the case. In doing so he was as much his own master and doing his own business as were the section-men. Had it appeared that it was part of his duty to look after the premises generally, and extinguish fires that might be ignited on them, his omission to put out the fire might possibly, within the case of *Chapman v. N. Y. C. R. Co.*, 33 N. Y. 369, be considered the negligence of the defendant. But nothing of the kind appears, and the burden is upon plaintiff to prove affirmatively every fact necessary to establish defendant's liability.

Order reversed, and new trial granted.

McCORD v. WESTERN UNION TEL. CO.

(39 Minnesota, 181.—1888.)

APPEAL by defendant from a judgment of the district court in favor of plaintiff in an action to recover for loss alleged to have been sustained by reason of a fraudulent message sent over defendant's line by one of its agents.

VANDERBURGH, J. Dudley & Co., who resided at Grove City, Minn., were the agents of plaintiff for the purchase of wheat for him. He resided at Minneapolis, and was in the habit of forwarding money to them, to be used in making such purchases, in response to telegrams sent over the defendant's line, and delivered to him by it. On the 1st day of February, 1887, the defendant transmitted and delivered to plaintiff the following message, viz.:

"GROVE CITY, MINN., February 1, 1887.

"To T. M. McCord & Co.: Send one thousand or fifteen hundred to-morrow.
DUDLEY & Co."

The plaintiff in good faith acted upon this request, believing it to be genuine, and, in accordance with his custom, forwarded through the American Express Company the sum of \$1,500 in currency, properly addressed to Dudley & Co., at Grove City. It turned out, however, that this dispatch was not sent by Dudley & Co., or with their knowledge or authority; but it was in fact false and fraudulent, and was written and sent by the agent of the defendant at Grove City, whose business it was to receive and transmit messages at that place. He was also at the same time the agent of the American Express Company for the transaction of its business, and for a long time previous to the date mentioned had so acted as agent for both companies at Grove City,

and was well informed of plaintiff's method of doing business with Dudley & Co. On the arrival of the package by express at Grove City, containing the sum named, it was intercepted and abstracted by the agent, who converted the same to his own use. The dispatch was delivered to the plaintiff, and the money forwarded in the usual course of business. These facts, as disclosed by the record, are sufficient, we think, to establish the defendant's liability in this action.

1. Considering the business relations existing between plaintiff and Dudley & Co., the dispatch was reasonably interpreted to mean a requisition for one thousand or fifteen hundred dollars.

2. As respects the receiver of the message, it is entirely immaterial upon what terms or consideration the telegraph company undertook to send the message. It is enough that the message was sent over the line, and received in due course by plaintiff, and acted on by him in good faith. The action is one sounding in tort, and based upon the claim that the defendant is liable for the fraud and misfeasance of its agent in transmitting a false message prepared by himself. *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; Gray, Tel., § 75.

3. The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim *respondeat superior* does not apply in such a case, because the agent in sending the dispatch was not acting for his master, but for himself, and about his own business, and was in fact the sender, and to be treated as having transcended his authority, and as acting outside of and not in the course of his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though they are many cases which fall within that rule. *Mott v. Ice Co.*, 73 N. Y. 547; *Savings Inst. v. Bank*, 80 N. Y. 168; *Potulni v. Saunders*, 35 N. W. Rep. 379. Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law duty growing out of the relations of the parties. 1 Shear. & R. Neg. (4th Ed.), §§ 149, 150, 154; Tayl. Corp. (2d Ed.), § 145. And it is immaterial in such case that the wrongful act of the servant is in itself willful, malicious, or fraudulent. Thus a carrier of passengers is bound to exercise due regard for their safety and welfare, and to protect them from insult. If the servants employed by such carrier in the course of such

employment disregard these obligations, and maliciously and willfully, and even in disregard of the express instructions of their employers, insult and maltreat passengers, under their care, the master is liable. *Stewart v. Railroad Co.*, 90 N. Y. 593. In *Booth v. Bank*, 50 N. Y. 400, an officer of a bank wrongfully discharged a judgment which had been recovered by the bank, after it had been assigned to the plaintiff. It was there claimed that the authority of the officer and the bank itself to satisfy the judgment had ceased, and that hence the bank was not bound by what its president did after such assignment. But the court held otherwise, evidently upon the same general principle, as respects the duty of the bank to the assignee, and laid down the general proposition equally applicable to the agent of the defendant in the case at bar, that the particular act of the agent or officer was wrongful and in violation of his duty, yet it was within the general scope of his powers, and as to innocent third parties dealing with the bank, who had sustained damages occasioned by such act, the corporation was responsible. And the liability of the corporation in such cases is not affected by the fact that the particular act which the agent has assumed to do is one which the corporation itself could not rightfully or lawfully do. In *Bank v. Bank*, 16 N. Y. 125, 133, a case frequently cited with approval, the teller of a bank was with its consent in the habit of certifying checks for customers, but he had no authority to certify, in the absence of funds, which would be a false representation, yet it was held, where he had duly certified a check though the drawer had no funds, that the bank was liable on the ground that, as between the bank which had employed the teller, and held him out as authorized to certify checks (which involved a representation by one whose duty it was to ascertain and know the facts), and an innocent purchaser of the check so certified, the bank ought to be the loser. *Gould v. Sterling*, 23 N. Y. 463; *Bank v. Bank*, 29 N. Y. 632. See, also, *Titus v. Turnpike Co.*, 61 N. Y. 237; *Railroad Co. v. Schuyler*, 34 N. Y. 30, 64; *Lane v. Cotton*, 12 Mod. 490. The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message, and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a dispatch to investigate the question of the integrity and fidelity of the defendant's agents in the performance of their duties before acting. Whether the agent is unfaithful to his trust, or violates his duty to, or disobeys the instructions of, the company, its patrons may have no means of know-

ing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation. *Bank v. Telegraph Co.*, 52 Cal. 280; *Booth v. Bank*, *supra*.

4. The defendant also insists that it is not liable for the money forwarded in response to the dispatch because it was embezzled by Swanson as agent of the express company. It is unnecessary to consider whether an action for the amount might not have been maintained against that company as well as against the defendant or the agent himself. The position of trust in which the defendant had placed him enabled him, through the use of the company's wires in the ordinary course of his agency, to induce the plaintiff to place the money within his reach. It is immaterial what avenue was chosen. Had it been forwarded and intercepted by a confederate, the result would have been the same. The proximate cause of plaintiff's loss was the sending of the forged dispatch. The actual conversion of the money was only the culmination of a successful fraud. The acts of Swanson as agent of the defendant and of the express company were the execution of the different parts of an entire plan or scheme. That his subsequent acts aided and concurred in producing the result aimed at, did not make the forged dispatch any the less operative as the procuring or proximate cause of plaintiffs' loss. *Railroad Co. v. Kellogg*, 94 U. S. *475; *Martin v. Iron Works*, 31 Minn. 407-410.

Order affirmed, and case remanded.

DEMPSEY V. CHAMBERS.

(154 Massachusetts, 330.—1891.)

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCulloch while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCulloch was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCulloch in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCulloch, became responsible for his negligence in the delivery of the

coal." The defendant excepted to this ruling, and to nothing else. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

* * * * *

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Edw. I. 128 (Roll's Ed.); 38 Lib. Ass. 223, pl. 9; S. C. 38 Edw. III. 18; 12 Edw. IV. 9, pl. 23; Plowd. 8 ad fin. 27, 31. See Bract. 158b, 159a, 171b. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitzh. Abr. "Bayllye," pl. 4, and doubted in Brooke, Abr. "Trespass," pl. 86, but it has been followed and approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by Chief Justice GASCOIGNE. Godb. 109, 110, pl. 129; 2 Leon. 196, pl. 246; *Hull v. Pickersgill*, 1 Brod. & B. 282; *Muskett v. Drummond*, 10 Barn. & C. 153, 157; *Buron v. Denman*, 2 Exch. 167, 178; *Secretary of State v. Sahaba*, 13 Moore, P. C. 22, 86; *Cheetham v. Mayor, etc.*, L. R. 10 C. P. 249; *Wiggins v. U. S.*, 3 Ct. Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (D. 46, 3, 12, § 4; D. 43, 16, 1, § 14; Y. B. 30 Edw. I. 128) has been changed to the dogma *æquiparatur* ever since the days of Lord COKE, 4 Inst. 317. See Brooke, Abr. "Trespass," pl. 113, Co. Litt. 207a; Wing. Max. 124; Com. Dig. "Trespass," C. 1; *Railway Co. v. Broom*, 6 Exch. 314, 326, 327, and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether

this doctrine applied to a case of a bare personal tort. *Adams v. Freeman*, 9 Johns. 117, 118; ANDERSON and WARBERTON, JJ., in *Bishop v. Montague*, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit (*Wilson v. Barker*, 1 Nev. & M. 409, 4 Barn. & Adol. 614; *Smith v. Lozo*, 42 Mich. 6, 3 N. W. 227); as in other cases it has been on the ground that they did not amount to such a ratification as was necessary, (*Tucker v. Jerris*, 75 Me. 184; *Hyde v. Cooper*, 26 Vt. 552.)

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present, when the ratification is established. *Perley v. Georgetown*, 7 Gray, 464; *Bishop v. Montague*, Cro. Eliz. 824; *Sanderson v. Baker*, 2 W. Bl. 832, 3 Wils. 309; *Barker v. Braham*, 2 W. Bl. 866, 868, 3 Wils. 368; *Badkin v. Powell*, Cowp. 476, 479; *Wilson v. Tumman*, 6 Man & G. 236, 242; *Lewis v. Read*, 13 Mees. & W. 834; *Buron v. Denman*, 2 Exch. 167, 188; *Bird v. Brown*, 4 Exch. 786, 799; *Railway Co. v. Broom*, 6 Exch. 314, 326, 327; *Roe v. Railway Co.*, 7 Exch. 36, 42, 43; *Ancona v. Marks*, 7 Hurl. & N. 686, 695; *Condit v. Baldwin*, 21 N. Y. 219, 225; *Exum v. Brister*, 35 Miss. 391; *Railway Co. v. Donahoe*, 56 Tex. 162; *Murray v. Lovejoy*, 2 Cliff. 191, 195, Fed. Cas. No. 9,963. See *Lovejoy v. Murray*, 3 Wall. 1, 9, 18 L. Ed. 129; Story, Ag. §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCulloch took on himself to deliver the defendant's coal for his benefit, and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit, if taken by itself, but it was so connected with McCulloch's employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability, for his negligent acts. See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; Cooley, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. . . .

Exceptions overruled.

(b) MASTER TO SERVANT.**PANTZAR V. TILLY FOSTER IRON MINING Co.**

(99 New York, 368.—1885.)

APPEAL from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, entered upon a verdict, in an action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant.

RUGER, CH. J. The general principles upon which this action depends have been so frequently discussed in recent cases that anything more than a brief summary would be unprofitable. Thus it has been held that a master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his duties. *Bartonskill Coal Co. v. Reid*, 3 Macq. 275; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 522; *Brydon v. Stewart*, 2 Macq. 34; *Booth v. B. & A. R. R. Co.*, 73 N. Y. 40. That "no duty belonging to the master to perform, for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance." *Mann v. Pres. etc., D. & H. C. Co.*, 91 N. Y. 500; *Booth v. B. & A. R. R. Co.*, *supra*. And that when the general management and control of an industrial enterprise or establishment is delegated to a superintendent with power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master, rendering him liable for any injury occurring to the servant therefrom. *Corcoran v. Holbrook*, 59 N. Y. 517.

The case shows that the defendant was the owner of a coal mine in Putnam county, New York, conducted under the management of a superintendent. He was invested by them with full power of control over the same, and ample discretion and authority in directing the work, and using all suitable measures and precautions for carrying on the business of mining, and securing the safety of the workmen employed in the prosecution of the enterprise.

The action under review was brought by a servant of the defendant

to recover damages for personal injuries received by him through the fall of a mass of rock, while working in a pit in which the mining operations in question were carried on. The plaintiff, at the time of the accident, was upon a wall in the course of construction, for the purpose of furnishing a place behind which to deposit the refuse material of the mine and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell. At the time of the accident this wall had been raised to the height of about sixty feet, and was still some fifty feet below the surface of the ground. While thus engaged with a number of other workmen a large mass was detached and fell from the brow of the projecting cliff under which the work was in progress, and caused the death of some and the serious injury of others among whom was the plaintiff. The evidence as to the condition of the rock at the time of the accident was conflicting, and raised questions of fact peculiarly within the province of the jury to determine. On the part of the defendant, it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, joints and foliations, and that it was in the frequent and continued habit of causing it to be examined for the purpose of discovering, if possible, appearances indicating immediate danger, and that no such indications had been observed before the accident. On the other hand, the plaintiff's evidence showed that a large crack, parallel with and about ten feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it and they were warned of its dangerous character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it was increasing in width, and still took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable and frequently adopted in other mines. In some cases braces of timbers extending across from the side of the pit to the rock liable to fall were used, and in others the overhanging rock had been blasted off. It was also shown that a wall, such as that in process of construction would, when completed, have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall, the crack disappeared. It must, therefore, be assumed from the verdict of the jury, that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable and of easy and safe application.

The evidence tended to show that the wall, then in course of construction, was not a safe and suitable protection for the laborers engaged in working upon it. It obviously required a long time to complete it,

and its main design seemed to be to furnish a place for the deposit of refuse material. During the course of its erection it certainly afforded no protection to those working below the cliff, and the jury was authorized to infer from the fact that it was not completed after a lapse of several years, that it was not originally designed as a means of present protection from the dangers of falling rock.

The degree of vigilance and care required of a master in the adoption of means of protection toward his servants has been much discussed by elementary writers as well as in reported cases, and the conclusions reached applicable to such a case as the present are not disputed. To accept the rule extracted from *Leonard v. Collins*, 70 N. Y. 90, and adopted in the appellant's brief, is to inquire whether "the master did everything which in the exercise of reasonable and ordinary care and prudence he ought to have done." "Did he omit any precaution which a prudent and careful man would take or ought to have taken," it is difficult to see how the defendant can claim exemption from liability.

But one exception was taken by the defendant in the case and that was to the denial by the court of its motion to nonsuit at the close of the plaintiff's evidence. It might very well be said that the broad question argued before us by the learned counsel for the defendant was not properly in the case as it was based to some extent upon evidence given subsequent to the taking of the exception; but as we think the judgment must in any event be affirmed, no injustice is done the plaintiff, by considering all of the evidence taken on the trial in determining the validity of this exception. The motion for a nonsuit was placed upon grounds stated concisely as follows: 1st. That the accident causing plaintiff's injury was incident to the hazardous nature of his employment and from a risk assumed by him in entering upon it. 2d. That it did not occur through an omission on the part of the defendant or its agents to perform any duty which it owed to the plaintiff. 3d. That there being no proof of the incompetency of the superintendent when originally employed, the defendant was not liable for an accident caused through an omission of duty on his part causing injury to a fellow-servant. It may be said with reference to the ground last stated that it is disposed of by reference to the general proposition laid down at the outset of this opinion, and the other grounds involved questions of fact upon which the evidence was quite sufficient to take the case to the jury. The motion assumes that the injury to the plaintiff occurred solely from a hazard incident to the nature of the employment, and not from a cause which could have been foreseen and guarded against by the exercise of proper care and prudence on the part of the master. This, however, was the very question which was disputed before the jury and decided by it adversely to the appellant.

The defendant's contention is based upon the evidence showing that

it is the nature of gneiss rock to disintegrate and fall from time to time at unexpected intervals through the action of the elements operating upon it; but it does not follow from this fact that the master is excused from using proper precautions to protect his workmen from danger known to the master arising from such a cause. The very fact that the material was likely to fall upon and injure the defendant's servants at unexpected times imposed upon defendant the duty of inspection and frequent and careful examinations, and upon the discovery of any indications of danger, to adopt all suitable precautions to protect its servants from injury. The rule that the servants take the risk of the service pre-supposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. *Booth v. B. & A. R. R. Co., supra.* It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes.

It was for an omission to observe the dangerous appearances to which the evidence shows its attention had been called and its neglect to adopt suitable and proper means of protection that the defendant has been held liable by the jury. The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock, and that his duties did not call him to any place from which it could be observed. He, therefore, had a right to rely upon the performance of the duty owing by the master of adopting proper and suitable measures of precaution to guard him against the consequence of any danger arising from the obviously unsafe condition of the rock, and is not justly censurable for an omission to discover the impending danger himself in time to avoid it. The master, however, had notice that the rock was in motion and was liable to fall at any moment and was, therefore, chargeable with the duty in the exercise of reasonable care and prudence of taking immediate steps to avoid the danger and of warning the men working under it, of the hazard to which they were exposed.

We, therefore, think that there was evidence sustaining the verdict of the jury and that the judgment should be affirmed.

All concur.

Judgment affirmed.

MADIGAN V. OCEANIC STEAM NAVIGATION CO.

(178 New York, 242.—1904.)

GRAY, J. The plaintiff's husband was employed by the defendant as one of a gang of stevedores and, while engaged upon the work of transferring coal from a barge into the steamship "Oceanic," he was killed. The plaintiff has sued to recover damages for his death; charging that it was caused through the negligence of the defendant. The plaintiff obtained a verdict in her favor; but the trial court set it aside and ordered a new trial. The Appellate Division, reviewing this order upon an appeal, reversed it and directed judgment to be entered for the plaintiff, in accordance with the verdict rendered. In that determination, the court was not unanimous and, upon this appeal by the defendant, the sole question, actually, is whether it had fulfilled its whole duty to its employé; with respect to providing a safe place for him in which to do his work. It was, and is, charged by the plaintiff that the defendant was negligent in the failure to supply lamps, or lights, to illuminate the interior of the coal barge, where the deceased was stationed upon the occasion in question. That omission, as it appears from the opinion of the majority of the Appellate Division justices, was regarded as having been the cause of the accident and because the coal foreman of the defendant was in charge of the work and represented the latter in that respect, his negligence in failing to provide the lights was to be attributed to the general employer.

The facts may be briefly stated. The coal barge lay between the steamship and the wharf, and a number of stevedores, of whom the deceased was one, were in the hold of the barge, engaged in shoveling coal into buckets, which were let down into the hold at the end of a rope, or "fall." When they were filled, they would be hoisted out and up the side of the steamship. The captain of the barge stood upon the barge's deck and, by the use of a guy rope attached to the "fall," he was able to control the rise of a bucket from, or its descent into, the hold. The importance of this was in the necessity of preventing the buckets from swinging to and fro and against the side of the vessel. Upon this occasion, work was commenced in the middle of the day and was continued until after sunset, when the hold had become darkened. McDonald was the defendant's coal foreman, who employed and directed the other stevedores, and it came within his duties to get out lamps, whenever the darkness made them necessary. He did not do so at this time, as he testified, because he "did not think it necessary." A bucket, which had been filled with coal on the side of the hold furthest away from the steamship, was being hoisted, when, from the failure of the

barge's captain to properly secure the guy rope, it swung violently over and towards the steamship; striking the head of the deceased against a bolt, projecting from the barge's side, and killing him. The barge's captain testified that it was too dark to enable him to see into the hold and that he did not know the coal bucket was hooked on. As the case was submitted to the jury, it is clear that the verdict must have been reached upon the theory that the defendant was liable for the foreman's neglect to supply the lights.

It was not disputed that the defendant had provided lamps, sufficient and quite available to the foreman for the men's use. They were in sheds on the wharf, and, also, upon the steamship, and if they were not used upon this occasion, it was, simply, because, in the foreman's judgment, they were not required. I cannot agree with the court below that the omission, or neglect, of this foreman was chargeable to the defendant. That he was so far the *alter ego* of the master, as to make the latter responsible for any failure to furnish a safe place to work in, or safe appliances to work with, may be readily admitted; but if, as to some detail of the undertaking, he was actually doing the work devolving upon a servant, the others took the risk of their fellow-servant's performance. The defendant was not at fault in any of those general respects, in which an employer is regarded as under obligations towards those whom he employs to work for him. The hold of the barge was a safe enough place to work in; the foreman was competent and no complaint is made as to the machinery, or appliances, used in the work. Whether a master shall be held to be liable, when the negligent act, or omission to act, was that of one of his servants, depends usually, if not, indeed, always, upon the character of the act. That is to say, if the specific act is one, the doing of which can be, properly and justly, regarded as within the personal duties of the master, whose performance he has delegated to another, and not some act within the line of a mere servant's duty, then the master is properly chargeable with the results of a negligent performance, or omission. When McDonald, the defendant's coal foreman, in the exercise of his judgment, omitted to get the lamps for the stevedores, which the defendant had been careful to provide, I think that it was the omission of a duty resting on the foreman as a fellow-servant, having that detail in charge. It was, either, for him to judge when the lamps were needed, or it was for the others to demand them, if the place had become too dark to remain in at work. There is no evidence of their having made any request of the foreman; so that, if the conditions had become so changed as to render continuance in their work dangerous, they all erred in their judgment. As it was said in *Kimmer v. Weber*, 151 N. Y. 417, where it was a question of sufficiently safe scaffolding, put up under the instructions of a foreman by the workmen, "it was, at most, but an error of judgment on the part

of the foreman with respect to a detail of the work, in which the masons—(in that case)—were engaged. He concluded, as the workmen themselves did, that the place was safe and, in determining that question, they were all co-servants.” In *Crispin v. Babbitt*, 81 N. Y. 516, the plaintiff, a laborer, was injured, while engaged with others in lifting the fly wheel off of an engine. The defendant, in that case, had intrusted the conduct of his business to a general manager and he, upon the occasion in question, carelessly started the engine. It was held that, notwithstanding his position, he was not, in what he did, acting in the defendant’s place. It was observed, in the opinion, that “a superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives.” In *Geoghegan v. Atlas Steamship Company*, 146 N. Y. 369, where it was claimed that the deceased had come to his death by reason of certain gangway doors in the side of the vessel having been carelessly left open, through which he had fallen, we held that the defendant was not liable for the failure of the officer, whose duty it was to close the doors, and that the negligence, which led to the result, was that of a co-servant. These cases, and others which might be cited, rest upon the principle that the liability of the master does not depend upon the grade, or the rank, of the servant, who represents him in the superintendence of the others in his employment, but the act, which causes, or results in, an injury, in the course of the work, must be of a character, which the master, as such, should perform, and not one, which would be expected of a servant, as such.

Here, the defendant provided a supply of lamps for its servants and they could, and should, have taken and used them, when they were required. To get them was a mere detail of the work, which it was the foreman’s duty, as one of a number of servants engaged in a common task, to execute.

I advise the reversal of the order of the Appellate Division and that a new trial be had; with costs to abide the event.

PARKER, Ch. J., O’BRIEN, BARTLETT, HAIGHT, CULLEN, JJ. (and MARTIN, J., in result), concur.

Order reversed, etc.

(c) *FELLOW-SERVANT RULE*.¹

FARWELL v. THE BOSTON & WORCESTER R. R. Co.

(4 Metcalf, 49.—1842.)

ACTION of trespass upon the case.

The plaintiff, an engineer in the employment of the defendants, ran his engine off at a switch on the road, which had been left in a wrong condition by one Whitcomb, a switch-man and also a servant of the defendants, thereby sustaining personal injuries to recover for which this action was brought.

SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper per-

¹ “When the service to be rendered requires for its performance the employment of several persons, . . . there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases, that he takes upon himself risks arising from the negligence of his fellow-servants, while in the same employment, provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable.” *Chicago Railway Co. v. Ross*, 112 U. S. 377.

The doctrine was first promulgated in England in 1837 (*Priestley v. Fowler*, 3 M. & W. 1,) although the question as to the liability of a master to a servant for the negligence of a fellow-servant was not directly involved, and first distinctly announced in 1850 (*Hutchinson v. York, New Castle & Berwick Railway Co.*, 5 Exch. R. 343.)

The doctrine was first announced in this country, in South Carolina, in 1841 (*Murray v. S. C. Railroad Co.*, 1 McMullan, 385), in Massachusetts, in 1842 (*Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49), and in New York, in 1849 (*Coon v. The Utica & Syracuse R. R. Co.*, 6 Barb. 231).

For a statement of the reason for the rule, see Shearman & Redfield on Negligence (5th ed.), § 179.

formance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431; *M'Manus v. Crickett*, 1 East. 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law—like that of a common carrier,

to stand to all losses of goods not caused by the act of God or of a public enemy—or that of an inn-keeper, to be responsible, in like manner, for the baggage of his guests; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestly v. Fowler*, 3 Mees. & Welsb. 1; *Murray v. South Carolina Railroad Company*, 1 McMullan, 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. *Copeland v. New England Marine Ins. Co.*, 2 Met. 440–443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties con-

cerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590, *et seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary

undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but

upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine: Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the

superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.

(d) *VICE-PRINCIPAL DOCTRINE.*¹

CRISPIN V. BABBITT.

(81 New York, 516.—1880.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff en-

¹ "At an early day, American judges divided sharply upon the question of the liability of a master to his servants, for the negligence of a servant of superior grade and in control of other servants. The question was passed upon, almost at the same time, in the East and the West; the Massachusetts court holding strongly in favor of masters, and the Ohio court strongly against them. A long conflict of opinions followed; and, . . . , in 1887, there was no general settled rule. Although entire unanimity has not yet been reached on some material points, several fundamental principles are fully agreed upon. It is now universally held, in American courts, that a master always *may* have, and sometimes *must* have, a servant, who acts as his representative or *alter ego* towards other servants; and that for the negligence of such representative, *while acting as such*, the master is responsible to the other servants, precisely as if it were his own. By general consent such representative, while acting

tered upon a verdict, in an action brought to recover damages for personal injuries.

The plaintiff, in the employment of the defendant, was assisting to draw a boat into dry dock, out of which it became necessary to pump the water after the boat had been docked. While the plaintiff, with others, was lifting the fly wheel of the engine, used for pumping purposes, off its center, one John L. Babbitt (not the defendant herein) carelessly let the steam on, thus starting the wheel and throwing the plaintiff on to the gearing wheel, where he received his injuries. It appeared that said Babbitt had general charge of the business, being at one time styled general superintendent and manager, and at another time business and financial man.

At the close of the case, the defendant requested the court, among other things, to charge the following:

13. That although John L. Babbitt may, as financial agent or superintendent, or overseer or manager, have represented defendant and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

The court so charged.

14. That as to any other acts or duties performed by him in or about the defendant's works at Whitesboro, or in or about the defendant's business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and as a fellow-servant of the plaintiff.

The court refused, saying, "I will leave that as a question of fact for the jury."

17. That if John L. Babbitt did let on the steam while plaintiff was engaged at the wheel, he was not, in so doing, acting in the defendant's place, but his act in so doing was his own act, and not the act of the defendant.

The court refused, leaving it to be determined as a question of fact by the jury, and to the refusals to charge the defendant excepted.

as such, is called a 'vice-principal.' And a vice-principal is not a 'fellow-servant.'" *Shearman & Redfield on Negligence* (5th ed.), § 226.

"The true test, it is believed, whether an employee occupies the position of a fellow-servant to another employee, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured; or, in other words, whether the person whose *status* is in question is charged with the performance of a duty which properly belongs to the master." *McKinney, Fellow-Servants*, § 23. See also *Hawkins v. N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416; *Ford v. Railroad Co.*, 110 Mass. 240; *Anderson v. Bennett*, 16 Or. 515; *Beesley v. F. W. Wheeler & Co.*, 103 Mich. 196.

See note on Superior Servants and Vice-Principals in VIII. *Harvard Law Rev.* 57.

RAPALLO, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondent superior*.

If the employee whose negligence causes the injury is a fellow-servant of the one injured, the doctrine does not apply. (*Conway v. Belfast, &c., Ry. Co.*, 11 Irish C. L. 353.)

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz: to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Conway v. Belfast Ry. Co.*, *supra*; Wood's Master and Servant, § 438. See, also, §§ 431, 436, 437. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to some inferior employee. On this principle the *Flike case* (53 N. Y. 549) was decided. CHURCH, CH. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. *As to such acts*, the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. (Wood's Master and Servant, § 438.) The citation which the court read to the jury from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent in supplying and maintaining suitable instrumentalities for the work re-

quired is a breach of duty for which the master is liable." These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employee. As between master and servant it was servant's, and not master's duty to operate the machinery.

*The judgment should be reversed.*¹

¹ The dissenting opinion by Earl, J., concurred in by Danforth and Finch, JJ., omitted.

THE BEREA STONE CO. V. KRAFT.

(31 Ohio St. 287.—1877.)

THE defendant in error brought this action against the plaintiff in error to recover damages alleged to have been caused by the negligence of the company, its servants and agents.

At the time of the injury, the company was engaged in loading stone from its quarry on cars, under the superintendence of one Stone, foreman of the quarry, using for the purpose a derrick, wire rope, chains and hooks. The hooks were designed for raising hard stone, they being unsafe and dangerous to hoist or raise soft stone, and of that fact Stone and the company were cognizant. While Kraft was engaged in loading some soft stone on cars, his co-worker being temporarily absent, the foreman, with the assistance of another workman, used the hooks instead of the chains. When the stone was swung over the car, Kraft attempted to steady it; the hooks gave way, breaking out a piece of the stone, which fell inflicting the injury complained of.

At the close of the case, the defendant below requested the court to charge:

1. That a corporation is liable to an employee for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance.

2. That if the injury was caused by the negligence of the defendant's foreman, when he was doing the work of a co-laborer with the plaintiff, and not when in the discharge of his duties as foreman and representative of the defendant, the plaintiff cannot recover, unless the plaintiff shows that the defendant did not exercise reasonable care and prudence in the selection of a foreman.

The court refused, and the defendant excepted. On error, the district court affirmed the judgment of the court of common pleas entered on a verdict in favor of the plaintiff.

BOYNTON, J. The errors assigned for which a reversal of the judgment is sought, are the refusal of the court to give to the jury the instructions requested, and the order overruling the motion for a new trial. That a corporation is liable to an employee for negligence, or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank of the agent intrusted with their performance, may, as matter of law, be very clear. But the proposition has no application to the case. It is true that the negligence charged as the cause of the injury, consisted in

the selection, use, and employment of unsafe, insecure, and dangerous implements and machinery for the purpose of loading stone upon cars for transportation. But upon the trial, no question was made, or doubt raised, of the fact that the company had supplied suitable and proper machinery and implements for loading stone, both hard and soft; but its liability was asserted on the ground of its negligent and careless use or employment of machinery and apparatus for hoisting stone, safe and suitable for the special purpose or use for which such machinery was designed, but unsafe and dangerous for the use to which it was applied. The request obviously had reference to the duty of a master to furnish, so far as the exercise of due care will accomplish it, suitable and safe instrumentalities for carrying forward his work, and these having, admittedly, been furnished, and the request having no other bearing, it was properly refused.

The second request was evidently founded on a misconception of the negligent act which gave rise to the company's liability. It was founded on the hypothesis that the want of care charged, and resulting in the injury to the defendant in error, consisted in the negligent or careless attachment of the hooks to the stone to be raised; hence it was contended that when Stone, the foreman, assisted in attaching or fastening the hooks to the stone, he was performing, not the duty of foreman, but the work of a common laborer, for the negligent performance of which the company was not liable. This was clearly a misapprehension of the ground upon which the liability of the company was asserted. The petition, as above stated, alleged negligence in the selection, use, and employment of unsafe, insecure, and dangerous implements and machinery. This was the full scope of the averment. No act of negligence was charged, and no liability claimed to exist, except such as originated in, and grew out of the selection, use, and employment of such implements and machinery for loading stone. The mode or manner of attaching or fastening the hooks to the stone was not the subject of complaint, nor set up as a ground for the recovery of the damages claimed.

But if this construction is too limited, if the liberality with which pleadings under the code are to be construed, would require us to hold that the language of the petition charging negligence in the "use of unsafe and dangerous implements," is sufficiently broad and comprehensive to include the act and mode of attaching the hooks to the stone, and is not to be confined and restricted to the sense that the hooks, being unsuitable for such service, were misapplied to an improper use, we still think the court did not err, as the proposition embraced in the request is not correct as a rule of law. Where the master, or one placed by him in the charge of men engaged in his service, personally assists or interferes in the labor being performed under his direction and con-

trol, and is, while performing such labor, or interfering with its performance, guilty of negligence resulting in an injury to one engaged in such service, there is no sound principle of law that will excuse or exonerate the master from liability. *Ormand v. Holland*, 96 Eng. Com. Law, 102; *Shear. & Red. on Neg.* § 89, *et seq.*; *Wharton on Neg.* § 205.

The ground of the liability of the master for the negligent conduct of his servant, in all cases where the liability arises, is, that the servant's act is the act of the master. The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow-servant, has no application where the servant by whose negligent conduct or act the injury is inflicted, sustains the relation of superior in authority to the one receiving the injury. The claim that Stone was a fellow-servant engaged in the same service with Kraft, is not supported by the proof. It is true that he was in the service of the same master, and engaged in the same general employment, but he was intrusted with duties and responsibilities of entirely a different nature, and wholly independent of those of Kraft. Occupying to the latter, the relation, substantially, of principal, he was in no just or proper sense a fellow-servant, nor engaged in what may properly be denominated a common service. The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court, and now firmly settled in the jurisprudence of the state, that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *C., C. & C. R. R. Co. v. Keary*, 3 Ohio St. 201; *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 541; *Whalon v. Mad River & Lake Erie R. R. Co.*, 8 Ohio St. 249; *The Pittsburgh, Fort Wayne & Chicago Railway Co. v. Devinney*, 17 Ohio St. 197.

The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised, may have caused the injury, and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in nowise relieves the company from liability. If the act done by him, had been done under his direction as he did it, by one of the employees of the company, its liability could not be doubted, and for the reason, that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person.

In support of the claim that a new trial ought to have been granted

on the ground that the evidence was insufficient to sustain it, it is contended: 1. That the evidence fails to show that the injury was occasioned by negligence; 2. That there is a fatal variance between the allegations and proof; and, 3. Contributory negligence by the plaintiff. We have carefully examined the evidence, and think neither of these objections can be sustained. We have the most doubt on the subject of contributory negligence. But, on the whole, our minds are not so clearly satisfied that the finding of the jury was wrong as to lead us to disturb the judgment. On the subject of the company's negligence, there is no doubt that the verdict was right. Where safe and unsafe instrumentalities are at hand, with which to perform a particular work, the adoption of the latter to the exclusion of the former, is clearly negligence. This is what the company did in the present case, and in so doing occasioned the injury to the plaintiff below.

Motion overruled.

(e) *NEGLIGENCE OF MASTER AND FELLOW-SERVANT CONCURRING.*

CONE V. DELAWARE, L. & W. R. R. Co.

(81 New York, 206.—1880.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action to recover damages for personal injuries.

While the plaintiff, in the employment of the defendant, was about his business as repairer, examining a car standing on a side track, another car, a few feet away on the same track and attached to an engine, took motion therefrom, and the plaintiff was caught between the two cars and injured. It appeared that the engineer had temporarily left his engine and that the engine took motion in consequence of steam escaping into the cylinder through a leaky valve; that such defect had been known for some time by defendant's master mechanic as also by the engineer, but not by the plaintiff; and that if the engineer had opened the cylinder cocks, the engine would not have started in consequence of such leakage.

DANFORTH, J. As between the plaintiff and the defendant, it was the duty of the latter to furnish its employees for use in the prosecution of its business, good and suitable machinery, and keep it in repair. *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Laning v. N. Y. C. R. R. Co.*,

49 id. 521; *Flike v. B. & A. R. R. Co.*, 53 id. 549; *Corcoran v. Holbrook*, 59 id. 519. It was also its duty to furnish for the management of such machinery, careful and trustworthy servants; and if these conditions were fulfilled, the plaintiff, although injured by the negligence of his fellow-servant, could maintain no action against their common principal. *Wright v. N. Y. C. R. R. Co.*, *supra*; *Coon v. S. & U. R. R. Co.*, 5 N. Y. 492. But that is not the case here. The plaintiff was not injured by the negligence of his co-employee, while managing good and suitable machinery. The defendant failed to supply machinery of that character. The engine in question was, in many important particulars, in bad condition; its fire-box was burned out, its stay-bolts had given way, its cylinders needed boring out, its valves facing; it leaked badly, and its flues were defective; and coming nearer to the immediate cause of the injury inflicted upon the plaintiff, it was found that its throttle-valve leaked and the thread upon the screw which serves to hold the reverse bar in place, and thus controls the motion of the engine, was so worn as to be useless. As a natural and necessary consequence of the defects last mentioned, the steam escaped from the boilers into the cylinders, the engine was put in motion, and as might have been expected, the accident occurred of which the plaintiff now complains. But more than this, the master mechanic, and also the general superintendent of the road, the superior officers directly representing the defendant, had been notified of these defects, but nevertheless directed the engine to be kept in use, "for" (as one of them said) "they were short of power, and had nothing to put in its place." So far this is the plaintiff's case, and is conclusive against the defendant unless answered, and what is its defense? Why, as I understand it, it is that the engine was furnished with cylinder cocks; that these cocks if opened would have allowed the steam to escape, thus preventing its accumulation in the cylinder, and its pressure upon the piston; that the engineer omitted to open the cocks, and was, therefore, guilty of negligence; that it was this negligence which caused the injury, and so the defendant is exonerated! But the cylinder cocks were part of a perfect machine, they were not added to supply the defects, or any of them to which I have above called attention. Therefore the defendant's contention comes to this: We concede that we failed in our duty, we did not supply a suitable machine, but our servant, the engineer, could, notwithstanding, have so managed that the defect should cause no harm.

If this doctrine is accepted it will loosen the rule of responsibility which now bears none too closely upon corporate conduct. It will seldom happen that unusual care on the part of an engineer would not prevent an accident. In this case he might have opened the cocks, or blocked the wheels, or with extreme care so separated the engine from its train that the two should occupy separate tracks. It now seems that

it would have been well to have done one or the other of these things. His omission to do so may have been negligence toward the defendant, but it does not remove the responsibility which attached to it, to furnish good and suitable machinery, or place it upon a subordinate whose duty is to be measured by the degree of skill necessary for its management, and who is not called upon to make good the want of corporate care and attention.

The case is not one for the application of the doctrine of equivalents. Nor could the jury be permitted to inquire whether the exercise of extraordinary diligence or skill on the part of the defendant's servant, the engineer, would not have neutralized the defendant's own negligence. This would require them to determine the "comparative negligence" of master and servant, and "strike a balance of negligence," which, even as between plaintiff and defendant, is not permitted. *Wilds v. H. R. R. Co.*, 23 How. 492. Neither upon principle nor authority can it be held that negligence of the servant in using imperfect machinery excuses the principal from liability to a co-employee for an injury which could not have happened had the machinery been suitable for the use to which it was applied. Had the injury resulted solely from the servant's negligence, the case would have been different. *Wright v. N. Y. C. R. R. Co.*, *supra*. And so the trial judge held. But the jury found that it did not, and the judgment rendered upon the verdict was properly affirmed.

The reasons given, therefore, by the learned judge at General Term (15 Hun, 172) are sufficient, and to them nothing more need be added.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

(f) SERVANT TO THIRD PERSON.

HARRIMAN v. STOWE.

(57 Missouri, 93.—1874.)

WAGNER, J. The plaintiff, a married woman, in conjunction with her husband, brought this action for damages against the defendant for injuries sustained by her in falling through a hatchway which, it was alleged, was constructed by defendant, and by him negligently, carelessly and wrongfully left insecure and unprotected.

The answer denied the allegation of negligence, and as a further defense, set up that the house where the hatchway was built was the property of defendant's wife, and that defendant in doing the work was

acting as her agent. There was a replication as to negligence and carelessness, but it was admitted that the property belonged to defendant's wife.

* * * * *

But it is urged with great pertinacity here that the defendant, in doing the work, was acting as the agent of another, and that, therefore, he is responsible to his principal only and not to the plaintiff.

The well-settled principle of law is, that where an agent is employed to perform or superintend work, the principal is responsible to third persons for injuries caused by the neglect or non-feasance of the agent in doing the work. *Morgan v. Bowman*, 22 Mo. 538. And this principle obtains, though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment. *Douglas v. Stephens*, 18 Mo. 362; *Minter v. Pacific Railroad*, 41 Mo. 503; *Garretzen v. Duenckle*, 50 Mo. 104.

In such cases the doctrine of *respondeat superior* applies, and the liability is cast upon the master who employed the agent and caused the work to be done. *Barry v. St. Louis*, 17 Mo. 121; *Clark v. H. & St. Jo. R. R.*, 36 Mo. 202.

Judge STORY says the distinction ordinarily taken, is between acts of misfeasance, or positive wrongs, and non-feasance, or mere omissions of duty by private agents. The law on this subject as to principals and agents is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant, in all cases within the scope of his employment. So the principal in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature that he is entitled to compensation. The agent is personally liable to third persons, for his own misfeasances and positive wrongs, but he is not in general liable to third persons for his own non-feasances or omissions of duty, in the course of his employment. His liability in these latter cases, is solely to his principal, there being no privity between him and such third persons; and the privity exists only between him and his principal. Therefore, the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *respondeat superior*, Story on Agency, § 308, and such is the general doctrine. 2 Kent Com. (10 ed.) 878, note; Pars. Cont. (5 ed.) 66; *Calvin v. Holbrook*, 2 Comst. 126; *Denny v. Manhattan Co.*, 2 Denio, 118; 1 Bl. Com. 413.

The true distinction as stated by Story, is between acts or misfeasance, or positive wrongs, and non-feasance, or mere omissions of duty. In the latter case, the master or principal is alone liable to third persons;

whilst in the former, the responsibility rests upon both the principal and agent. Thus, in *Wright v. Wilcox*, 19 Wend. 343, COWEN, J., speaking for the court, says: "In a case of strict negligence by a servant, while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time, and under the same circumstances; the servant in fact and the master constructively, by the servant, his agent." Lord HOLT, in his celebrated judgment in *Lane v. Colton*, 12 Mod. 488; S. C., Ld. Raymond, 646, 655, says that for the neglect of the servant, third person can have no remedy against him, but that the master is alone chargeable; but for a misfeasance, or actual tort, an action will lie against the servant, because he is a wrongdoer. The same views are confirmed in numerous adjudged cases. *Cary v. Webster*, 1 Strange, 480; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Snydam v. Moore*, 8 Barb. 358; *Phelps v. Wait*, 30 N. Y. 78.

The present case seems to be one, not of mere non-feasance or omission, but of strict negligence or wrong. The agent undertook and proceeded to build the trap-door, but did it so negligently as to cause the injury; under such circumstances the action would be maintainable against the agent and the principal also. The answer states, and the pleadings admit, that the house, upon which the work was done, was the property of defendant's wife, and that he was acting as her agent. But it is not averred, nor does the case anywhere show, that it was her separate estate. If she simply owned the fee simple, as is inferable from the pleading, then the defendant, in constructing the trap-door, was acting for himself as well as for his wife, for the uses, rents and profits of the wife's realty belong to the husband during coverture.

Under any view that we can take of the case, we think that the action was properly brought, that the judgment was right and should be affirmed; the other judges concur.

OSBORNE v. MORGAN.

(130 Massachusetts, 102.—1881.)

GRAY, C. J. The declaration is in tort, and the material allegations of fact, which are admitted by the demurrer, are that while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up by direction of the corporation certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one the superintendent and the others agents and servants of the corporation, being employed in that business,

negligently, and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell upon and injured the plaintiff. Upon these facts, the plaintiff was a fellow-servant of the defendants. *Farwell v. Boston & Worcester Railroad*, 4 Met. 49; *Albro v. Agawam Canal*, 6 Cush. 75; *Gilman v. Eastern Railroad*, 10 Allen, 233, and 13 Allen, 433. *Holden v. Fitchburg Railroad*, 129 Mass. 268; *Morgan v. Vale of Neath Railway*, 5 B. & S. 570, 736, and L. R. 1 Q. B. 149.

The ruling sustaining the demurrer was based upon the judgment of this court, delivered by Mr. Justice MERRICK, in *Albro v. Jaquith*, 4 Gray, 99, in which it was held that a person employed in the mill of a manufacturing corporation, who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskilfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But, upon consideration, we are all of opinion that that judgment is supported by no satisfactory reasons, and must be overruled.

The principal reason assigned was, that no misfeasance or positive act of wrong was charged, and that for non-feasance, which was merely negligence in the performance of a duty arising from some express or implied contract, with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing; but it is misfeasance, doing improperly. Ulpian, in Dig. 9, 2, 27, 9. *Parsons v. Winchell*, 5 Cush. 592. *Bell v. Josselyn*, 3 Gray, 309. *Nowell v. Wright*, 3 Allen, 166. *Horner v. Lawrence*, 8 Vroom, 46. Negligence and unskillfulness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere non-feasance, within the meaning of

the rule relied on, than negligence in the control of fire, as in the case in the Pandects; or of water, as in *Bell v. Josselyn*; or of a drawbridge, as in *Nowell v. Wright*; or of domestic animals, as in *Parsons v. Winchell*, and in the case in New Jersey.

In the case at bar, the negligent hanging and keeping by the defendants of the block and chains, in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with instruments in the defendants' actual use or control for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract with them, and his damages would be for the injury to his property, and could not include the injury to the person of this plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow-servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby. *Hawkesworth v. Thompson*, 98 Mass. 77. *Norton v. Sewall*, 106 Mass. 143. *May v. Western Union Telegraph*, 112 Mass. 90; *Grinnell v. Western Union Telegraph*, 113 Mass. 299, 305; *Ames v. Union Railway*, 117 Mass. 541; *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Rapson v. Cubitt*, 9 M. & W. 710; *George v. Skirvington*, L. R. 5 Ex. 1; *Parry v. Smith*, 4 C. P. D. 325; *Foulkes v. Metropolitan Railway*, 4 C. P. D. 267, and 5 C. P. D. 157. This case does not require us to consider whether a contractor or a servant, who has completed a vehicle, engine or fixture, and has delivered it to his employer, can be held responsible for an injury afterwards suffered by a third person from a defect in its original construction. See *Winterbottom v. Wright*, 10 M. & W. 109; *Collio v. Selden*, L. R. 3 C. P. 495; *Albany v. Cunliff*, 2 Comst. 165; *Thomas v. Winchester*, 2 Selden, 397, 408; *Coughtry v. Globe Woollen Co.*, 56 N. Y. 124, 127.

It was further suggested in *Albro v. Jaquith*, that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another. The only such considerations specified were that the servant, in either case,

is presumed to understand and appreciate the ordinary risk and peril incident to the service, and to predicate his compensation, in some measure, upon the extent of the hazard he assumes; and that "the knowledge, that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work, will naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all." The cases cited in support of these suggestions were *Farwell v. Boston & Worcester Railroad*, 4 Met. 49, and *King v. Boston & Worcester Railroad*, 9 Cush. 112, each of which was an action by a servant against the master; and it is hard to see the force of the suggestions as applied to an action by one servant against another servant.

Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with, and receive no compensation from, each other. It may well be doubted whether a knowledge, on the part of the servants, that they were in no event to be responsible in damages to one another, would tend to make each more careful and prudent himself. And the mention by Chief Justice SHAW, in *Farwell v. Boston & Worcester Railroad*, of the opportunity of servants, where employed together, to observe the conduct of each other, and to give notice to their common employer of any misconduct, incapacity, or neglect of duty, was accompanied by a cautious withholding of all opinion upon the question whether the plaintiff had a remedy against the person actually in default; and was followed by the statement, (upon which the decision of that case turned, and which has been affirmed in subsequent cases, some of which have been cited at the beginning of this opinion), that the rule exempting the master from liability to one servant for the fault of a fellow-servant, did not depend upon the existence of any such opportunity, but extended to cases in which the two servants were employed in different departments of duty, and at a distance from each other. 4 Met. 59-61.

So far as we are informed, there is nothing in any other reported case, in England or in this country, which countenances the defendants' position, except in *Southcote v. Stanley*, 1 H. & N. 247; S. C., 25 L. J. (N. S.) Ex. 339; decided in the court of Exchequer in 1856, in which the action was against the master, and Chief Baron POLLOCK and Barons ALDERSON and BRAMWELL severally delivered oral opinions at the close of the argument. According to one report, Chief Baron POLLOCK uttered this *dictum*: "Neither can one servant maintain an action against another for negligence while engaged in their common employment." 1 H. & N. 250. But the other report contains no such *dictum*, and represents Baron ALDERSON as remarking that he was "not prepared to say that the person actually causing the negligence," (evidently

meaning "causing the injury," or "guilty of the negligence"), "whether the master or servant, would not be liable." 25 L. J. (N. S.) Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow-servant was admitted in two considered judgments of the same court, the one delivered by Baron ALDERSON four months before the decision in *Southcote v. Stanley*, and the other by Baron BRAMWELL eight months afterwards. *Wiggett v. Fox*, 11 Exch. 832, 839; *Degg v. Midland Railway*, 1 H. & N. 773, 781. It has since been clearly asserted by Barons POLLOCK and HUDDLESTON. *Swainson v. North-eastern Railway*, 3 Ex. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. *Wright v. Roxburgh*, 2 Ct. of Sess. Cas. (3d series) 748. *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 Ind. 547; *Griffiths v. Wolfram*, 22 Minn. 185. *Exceptions sustained.*

(g) SERVANT TO MASTER.

GRAND TRUNK RAILWAY CO. v. LATHAM.

(63 Maine, 177.—1874.)

ONE Benson and wife recovered judgment against the Grand Trunk Railway Co., in an action to recover damages for mal-treatment by and misconduct of defendant's intestate, a conductor upon and in charge of the train upon which the Bensons were passengers. The deceased was informed that the company would hold him responsible, and advised him to settle, but he requested the company to defend the suit which was done. That suit, including the verdict, costs, fees of counsel and of witnesses, cost the company \$792.20. The company then brought this action against the deceased conductor's representative to recover that amount, and obtained a verdict therefor.

APPLETON, C. J. A judgment was recovered against the plaintiff corporation for the misconduct of the defendant's intestate—a servant in their employ. This suit is brought to recover compensation for the loss and injury by them sustained in consequence of such misconduct.

The presiding justice instructed the jury that an employer might recover in an action against his servant for all loss and damage caused by the servant's breach of duty, and that it was the duty of Latham (the defendant's intestate), in the exercise of his vocation as conductor, to treat all passengers civilly and respectfully; and if he failed to do so,

and in consequence of such failure his employer sustained loss and damage, he is liable for all the loss and damage so sustained.

Every servant is bound to take due care of his master's property entrusted to him. If guilty of gross negligence, whereby it is injured, he is liable to an action. So, too, if guilty of fraud or misfeasance, whereby damage has accrued to his master.

A servant is liable to an action at the suit of his master, when a third person has brought an action, and recovered damages against the master, for injuries sustained in consequence of the servant's negligence or misconduct; and in such action against the servant, the verdict against the master, in the action brought against him, is evidence as to the *quantum* of damages, though not, according to some of the English authorities, as to the fact of the injury. *Smith's Master and Servant*, 66.

The evidence shows that Latham was notified of the pendency of the suit against the plaintiffs; that he was present and a witness at the trial; that he was advised and requested to settle; and that the defense was made by the plaintiffs at his request; and that he was fully informed that he would be held responsible for the amount recovered against the plaintiffs. The principles established in *Veazie v. Penobscot R. R. Co.*, 49 Maine, 119, and in *Portland v. Richardson*, 54 Maine, 46, are applicable to the case at bar.

The defendant's counsel requested the court to instruct the jury that the plaintiffs could not recover for counsel fees and disbursements in conducting the suit against the plaintiffs; or, necessarily, the amount of the judgment paid by them, but the only actual damages to Mrs. Benson, (the plaintiff in that suit) caused by the improper conduct of Latham, if there was any.

This instruction the court declined to give.

The defendant's intestate had been guilty of gross misconduct. It was his duty to settle the suit brought against his employer for damages caused by such misconduct. Instead of so doing he requested that a defense should be made. Having requested the plaintiff to defend, and being present at the trial as a witness, he cannot object to the costs and expenses which accrued in consequence of complying with his request.

The instruction, as requested, should not have been given. It is unnecessary to consider the other portion of the requested instruction, for it is not the duty of the court to dissect a request and eliminate its errors. It is sufficient, therefore, that the request, in its totality, was erroneous. It is not, therefore, important to discuss the residue.

Exceptions overruled.

WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

(h) INDEPENDENT CONTRACTOR.

ATLANTIC TRANSPORT CO. v. CONEYS.

(82 Federal Reporter, 177.—1897.)

ERROR to the Circuit Court of the United States for the Southern District of New York, to reverse a judgment entered upon a verdict of the jury in favor of Michael Coneys, the plaintiff below, in an action to recover damages for personal injuries caused by the negligence of persons alleged to be the servants of the defendant. The plaintiff, an employé of an elevator company, was at work upon a canal boat alongside of the defendant's steamer Mississippi, and between it and a grain elevator from which the steamer was loading. He was injured by the fall upon him of a wooden shutter which was used for closing a gangway at the side of the top deck of the steamer, and was a part of the fittings of the vessel, and which was being handled by carpenters in the employment of H. P. Kirkham & Son, a firm of carpenters, who were repairing the cattle stalls. The accident happened through the negligence of the carpenters. The defendant contended that the workmen were in the employment of independent contractors, and were not its servants, and, in various forms, requested the trial court to thus instruct the jury. The court charged the jury that the evidence showed they were not the servants of an independent contractor, but that they were doing the ship's work at the request of, and under the direction of, the ship's officers. To this charge the defendant excepted, and the assignments of error relate to this exception, and to the various refusals of the trial judge to direct otherwise.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above.) The fact of a distinction between the liability of an employer for an injury caused by the negligence of his employee or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor who undertakes to execute specified work upon the owner's property, was formerly not well recognized, (*Bush v. Steinman*, 1 Bos. & P. 404), but is now distinctly understood. *Hilliard v. Richardson*, 3 Gray, 349. If any confusion now exists, it is in regard to the controlling tests that determine the character of the particular contract which is under examination. The two kinds of employment are frequently close to each other, and, while it is often not difficult to appreciate and understand the difference between the two classes of contracts, it is some-

times difficult to express the distinctions with exactness of language. The cases of *Casement v. Brown*, 148 U. S. 615, and *Railroad Co. v. Hanning*, 15 Wall. 649, illustrate that, while two contracts may apparently be similar in phraseology, yet their nature and subject-matter may place the respective contracting parties in different relations to each other. The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment (*Corbin v. American Mills*, 27 Conn. 274), or whether the owner can discharge the subordinate workmen, and not to regard as essential, or an absolute test, so much what the owner actually did when the work was being done, as what he had a right to do. Many circumstances may combine, as in *Butler v. Townsend*, 126 N. Y. 105, which show that the relation of an independent contractor exists, but the significant test, which courts regard as of an absolute character, has been variously expressed by them as follows:

"The test, I think, always is, had the superior control or power over the acting or mode of acting of the subordinates? * * * Was there a control or direction of the person, in opposition to a mere right to object to the quality or the description of the work done? * * * On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior, in the sense of the maxim, and not answerable for their fault or negligence." LORD GIFFORD in *Stephen v. Commissioners*, 3 Sess. Cas. (4th Series Scot.) 535, 542.

In *Linnehan v. Rollins*, 137 Mass. 123, 125, the instruction of the trial judge, which was adopted by the appellate court, was:

"The absolute test is not the exercise of the power of control, but the right to exercise power of control."

In *Hexamer v. Webb*, 101 N. Y. 377, the court said:

"The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as the result of his work, and not as to the means by which it is accomplished."

In *Casement v. Brown*, *supra*, the court, by Mr. Justice BREWER, said:

"The will of the companies [the owners] was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work."

Whereas, in *Railroad Co. v. Hanning, supra*, the court found that the essence of the contract to rebuild an old wharf, and "make it as good as new," was a reservation of the power, "not only to direct what shall be done, but how it shall be done."

In the case now under consideration the contract was not in writing, but was manifested by the course of business between the parties, and the witnesses are not at variance as to its terms. There was no question before the jury as to the evidence, but the plaintiff in error insists that it was entitled to a ruling that the legal conclusions from the evidence must be that the firm of carpenters stood in the position of independent contractors, or at least that the question of the character of the contract was one for the jury. The members of the court concur in the opinion that the facts did not entitle the plaintiff to the absolute ruling which was asked for, and the majority are of opinion that the only just inferences from the testimony are that the relation between the shipowners and the carpenter was that of master and servant. The dissenting judge thinks that the inferences might be twofold, and that the question should have been submitted to the jury.

The steamship company had for four years before the accident been operating a line of steamers carrying horses, cattle, and general cargo from New York. Whenever a steamer arrived in port, its fittings for cattle and other equipments for the carriage of freight required repairs, which were uniformly made by Kirkham & Son, who charged for work by the hour, and for material by the foot. The dock superintendent of the steamship company, in reply to the question, "Describe to us how the work is done; who gives the directions?" said:

"There are hardly any directions to be given. Mr. Kirkham has a foreman there, and he goes to work,—being used to this work, he knows just what is to be done; and he goes ahead and does this work regularly each week, excepting possibly when we have horses. When we have horses, then I counsel him how many horses."

In reply to the question, "What kind of work do they do on the ship, and how long are they there generally each trip?" he said:

"Some of them are there most all the time while the ship is in port. There is so many things, to be done—fitting up the boat for grain, and tinkering around, one thing and another; fixing up the cattle fittings; fixing up for the horses—that it takes a larger, or smaller gang, according to the amount of work, most of the time the ship is in port."

The carpenters' foreman testified that he goes over every vessel of the steamship company as it arrives, and reports the result of his inspection to the superintendent, who tells him to go ahead with the work; that when the *Mississippi* came in, the superintendent being absent, the assistant gave orders to go ahead and see to the repairing the same as usual; that in practice the witness got instructions from

the captains once in a while, "in the nature of alterations, or any thing that way;" and that it was a part of his general duty to do any repairing that he sees is needed, and asked for by the captain or by the dock superintendent. Kirkham & Son are the jobbing carpenters customarily employed by this steamship line. Their experience has been such that their ascertainment of the necessary amount of repairs is relied upon. They are told to do the work, and, as a rule, need no other directions. But both the captains and the superintendent have the right to direct the extent and the manner of the alterations and repairs. It is a right not often exercised, for the carpenters apparently had the confidence of the superintendent, but the right existed. But it may be said that, while it is true that the officers of the defendant had some general power to direct how alterations and repairs should be made, they had no particular power "to direct and control the manner of performing the very work in which the carelessness occurred," and that the existence or non-existence of such kind of power is the real question in the case, which is true. *Charlock v. Freel*, 125 N. Y. 357; *Vogel v. Mayor*, 92 N. Y. 18. The subject-matter to which the course of business related—that of a series of minor jobbing repairs—tells with a good deal of clearness what the rights of the respective parties were. The contract of the superintendent was not analogous to that of a householder's occasional contract with a tinman to tin a roof, or with a painter to paint a house. It was analogous to that of the owner of a house who customarily calls in the jobbing carpenter whom he is in the habit of employing, and starts him in the work of "tinkering around, one thing after another," and doing the various jobs of repairs which time has shown to be necessary. The manner in which the work shall be done, and the dangers to be avoided, as well as the extent to which the work shall be carried on, are under the control and guidance of the owner. In this case separate bills were made out for the separate kinds of work upon each vessel, and for the materials furnished for each job; and, while the mode of payment is not essential, it was not in harmony with the usual incidents of the contract of an independent contractor. Inasmuch as, in our opinion, the only inference that can fairly be drawn from the testimony is that the steamship company and the carpenters were in the usual relation of master and servant, the judgment of the circuit court is affirmed.

WALLACE, Circuit Judge (dissenting). I think that the evidence upon the trial presented a question of fact for the determination of the jury,—whether Kirkham & Son were contractors, exercising an independent calling, and delegated with the responsibility of deciding how the carpenter work which they were to do for the defendant should be done, subject to the right of the defendant to object to the quality of

the work, or whether the relation between their subordinates and the defendant was that of master and servant. Unless the defendant, pursuant to the understanding or course of business between it and Kirkham & Son, had the right to direct and control the manner of performing the very work in which the carelessness occurred by which the plaintiff was injured, the employés of Kirkham & Son were not its servants. In my opinion, the trial judge erred in taking this question from the jury, and deciding as matter of law that these employés were the servants of the defendant. I therefore dissent from the opinion of the court.

BERG V. PARSONS.

(156 New York, 190.—1898.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff entered upon a verdict, in an action brought to recover damages for injury to property, alleged to have been caused by the carelessness of a contractor employed by the defendant.

See dissenting opinion by GRAY, J., for a statement of the facts of this case.

MARTIN, J. The doctrine of *respondeat superior* is based upon the relation of master and servant or principal and agent. As no such relation existed between the parties, I find no ground upon which the judgment in this action can be sustained.

The rule that where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence or that of his servants, is well established by the authorities in this State. *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor, etc.*, 8 N. Y. 222; *Kelly v. Mayor, etc.*, 11 N. Y. 432; *McCafferty v. S. D. & P. M. R. R. Co.*, 61 N. Y. 178; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181; *Town of Pierrepont v. Loveless*, 72 N. Y. 211; *Ferguson v. Hubbell*, 97 N. Y. 507; *Herrington v. Village of Lansingburgh*, 110 N. Y. 145; *Roemer v. Striker*, 142 N. Y. 134.

In *Blake v. Ferris*, the defendant had a license to construct at his own expense, a sewer in a public street. He engaged another person to construct it for a stipulated price. The sewer was left at night in a negligent manner by the workmen who were employed in its construction. It was held that the immediate employer of the servant, through whose

negligence the injury occurred, was responsible, but that the primary principal or employer was not.

In *Pack v. Mayor, etc.*, which was an action for damages caused by the alleged negligence of a contractor in blasting rocks, which resulted in injury to the plaintiff's house, in personal injury to his wife, and in killing one of his children, it was held that, as the work was being prosecuted under a contract with a person who was to perform it, the corporation was not liable, but that a recovery for such an injury could be had only against one to whom he stands in the relation of servant or agent, and that the contractor in such a case was not the servant or agent of the corporation.

The *Kelly* case was also an action for damages occasioned by negligence in blasting. In that case there was a contract between the city and a contractor to grade a certain street, and it was held that the city was not liable for damages occasioned by negligence in the performance of the work, but that the contractor was alone liable, although the contract provided that the work should be done under the direction and to the satisfaction of the officers of the corporation.

The *McCafferty* case was for an injury to the plaintiff's store and property by alleged negligence in blasting rocks necessary for the construction of the defendant's road. There the corporation had let the work of constructing the road by contract, and the negligence was that of the contractor or his employees, and this court held that the defendant was not liable, and that there was no distinction between real and personal property, so far as its negligent use and management were concerned, or of negligent acts upon it by others.

In the *King* case the owner of real property was held not liable for injuries resulting from negligence on the part of a contractor or his employees engaged in performing a lawful contract for specific work upon the premises of the defendant, and the rule that the law will not impute to one person the negligent acts of another, unless the relation of master and servant or principal and agent exists, was again asserted.

The same doctrine was held in the *Town of Pierrepont* case, where the *Blake* and *Pack* cases were followed, and it was declared that a contractor or his employees did not stand in the relation of servants to a person who was the owner of the property and with whom the contract was made, and that the latter was not answerable for their negligence.

In *Ferguson v. Hubbell*, where the injury for which a recovery was sought resulted from the act of a contractor, it was again decided that the contractor was, in no sense, the servant of the defendant, and that the doctrine of *respondeat superior* did not apply.

The *Herrington* case was for damages occasioned by carelessness in blasting. The work was done by contractors, and the court followed

its previous decisions and held that the defendant was not liable, but that the injury was occasioned by the negligence of the contractors, and that they alone were responsible.

The *Roemer* case was also for negligence in blasting and excavating on the defendant's premises which adjoined the premises of the plaintiff. The work was done by a contractor, and the owner was held not liable.

It seems to me that the principle of these decisions is decisive of the case at bar, and is directly adverse to the contention of the respondent. The only authorities in this state cited as sustaining the doctrine contended for, are *Blake v. Ferris*, 5 N. Y. 48, and *Storrs v. City of Utica*, 17 N. Y. 104. The *Blake* case we have already referred to, which is a direct authority against the doctrine it is cited to sustain. In the *Storrs* case the facts were different, and the principle of the decision has no application. There the doctrine of the *Blake*, *Kelly* and *Pack* cases were expressly endorsed in the opinion of Judge COMSTOCK, who said: "Now, in these two cases of *Pack v. The Mayor, etc.*, and *Kelly v. The Mayor, etc.*, the general doctrines so well set forth in *Blake v. Ferris* were applied with entire precision and accuracy." While the learned judge doubted the propriety of the application of that doctrine to the case of *Blake v. Ferris*, he expressly recognized its correctness and its applicability to a case like this. The decision of the court in the *Storrs* case was placed upon the sole ground that it was the duty of the corporation to keep its street in a safe condition for public travel, and for a failure to discharge that duty the corporation was liable. The question of the negligent manner in which the work was performed was entirely excluded by the opinion in that case.

There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of those exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it. In the case at bar the work contracted for was lawful and necessary for the improvement and use of the defendant's property. Consequently no liability can be based upon the illegality of the transaction, but it must stand upon the negligence of the contractor or his employees alone. It seems very obvious that,

under the authorities, the defendant was not responsible for the acts of the contractor or his employees, and that the court should have granted the defendant's motion for a nonsuit. If a contrary rule were established it would not only impose upon the owners of real property an improper restraint in contracting for its improvement, but would open a new and unlimited field for actions for the negligence of others which has not hitherto existed in this state, and practically overrule a long line of decisions in this court which firmly establish a contrary doctrine.

It follows that the judgment should be reversed.

GRAY, J. (dissenting): The question is whether, in a case like the present one, where the work contracted for is obviously and necessarily hazardous, it is an assumption inconsistent with the doctrine of exemption for the acts of an independent contractor that a legal duty is imposed upon him who employs the contractor to use a reasonable amount of care, in the selection of one who is both competent and careful and that for a failure to perform that duty he may be held for the damages occasioned by negligence.

The plaintiff and the defendant were owners of adjoining pieces of real estate in the city of New York. Upon the plaintiff's property there was a dwelling house. The defendant's property was vacant and was covered with a mass of rock, which extended above the curb. The defendant made a contract with one Tobin to excavate his plot to the depth of ten feet below the curb line, preparatory to building thereon. In the performance of the contract, Tobin appears to have proceeded unskilfully and with considerable recklessness and, in the work of blasting, he caused some damage to the plaintiff's house, both within and without. For the damage so sustained the plaintiff brought the present action. The complaint charged, and the case went to the jury upon the theory, that the defendant had failed to exercise proper care, or a due regard, for the safety of the plaintiff's premises in the selection of a competent and careful contractor to do the dangerous work of excavating the earth and rock. The defense was, in substance, that the person employed by the defendant for the purpose was an independent contractor, having the entire control and management of the work, and that as the result of inquiries, showing him to be a competent, skilful and careful contractor, the defendant had made the contract with him. Upon the trial, the evidence showed that the defendant had committed to one Squier the supervision of the construction of the building upon his land and that he acted for him in all pertinent matters. Squier was a builder of very considerable experience and had had much to do with contracts in the building of houses in the city. He had never heard of Tobin, before giving him the contract for the work in ques-

tion. That work was shown to have been plainly of a hazardous nature; inasmuch as it necessitated the blasting out of a ledge of rock, which extended close up to the wall of the plaintiff's adjoining house. There was evidence to the effect that it was quite possible to do this work of excavation without causing injury to the adjoining building and that work of that description was being constantly done in the city, with safety to adjoining premises. The way that Tobin performed his contract warranted a belief that he was incompetent and reckless. He was the lowest bidder for the work. The evidence showed him to be an illiterate person and of intemperate habits, whose appearance and surroundings might permit inferences adverse to his fitness to do responsible work of such a nature. There was testimony concerning two previous jobs of a similar nature, from which it might be inferred that Tobin was either reckless, or lacked skill. Squier testified, for the defendant, to having inquired of the representative of a real estate operator about Tobin; who spoke of him as a good and careful blaster, and he visited two places, to which Tobin had referred him, to see work that he had done. That inquiry satisfied him. He denied any knowledge of Tobin's habits; but he made no inquiry concerning them. A witness testified to having employed Tobin upon rock excavation and to having found him satisfactory in his work. While there was evidence of some care having been exercised by the defendant's agent, was it of that conclusive nature which precluded criticism? As the case stood, it could not be said as matter of law that the defendant had discharged his whole duty towards the plaintiff, in the matter of the selection and employment of a proper person to perform the required work. There was a fair question upon the evidence, whether, in initiating a work which, under the particular circumstances, was necessarily fraught with some danger to the adjoining property, the defendant had exercised a reasonable degree of prudence in the employment of Tobin. The plaintiff was not obliged to show that the defendant knew about the characteristics and previous conduct of Tobin; but, there being evidence, in the testimony of the witnesses, affecting his capacity and habits, previously to the employment, it became a question whether defendant's inquiries were sufficient and such as a prudent man would have made, who realized the hazards involved to the adjoining property and who intended to proceed about the employment of a contractor, as he would have expected to be done by if the positions were reversed. The plaintiff recovered a verdict for the amount of the expense to which he had been put in repairing the damage done to his house. It is, of course, evident from that verdict that the evidence had failed to satisfy the jury that the defendant had proceeded in the matter with a due regard for his neighbor's rights, or that Tobin was the kind of man to be intrusted with a job demanding both skill and a sense of responsibility.

If there was evidence raising a question as to whether the defendant had exercised reasonable care in contracting out this work to Tobin, then I think it was properly submitted to the determination of the jury. What is there in the doctrine, behind which the defendant seeks to shelter himself, which should interfere with the trial and submission of the issue which was tendered by the complaint and accepted by the answer; namely, whether proper care had been exercised by the defendant in committing the work to Tobin? The argument for the defendant is, as Tobin was performing his work as an independent contractor, that he and his men were not under the supervision or control of the defendant and that, as no relation of master and servant existed, the defendant could come under no liability for Tobin's negligent acts.

The doctrine, which exempts a person from liability for damages caused by the negligence of an independent contractor employed by him, is well established in this state. It rests upon a basis of justice and of reason and was a departure from the general doctrine of the responsibility of the master for the servant's acts; which the courts, both in England and this state, have agreed upon within comparatively recent years. *Quarman v. Burnett*, 6 M. & W. 499; *Reedie v. Railway Co.*, 4 Exch. 254; *Blake v. Ferris*, 5 N. Y. 48; *Storrs v. City of Utica*, 17 ib. 104.

Formerly, the rule *respondeat superior* was deemed controlling and the legal relation of master and servant, to which it was applicable, received the broad extension, within which the employer of another became responsible for the other's acts, upon the principle *qui facit per alium facit per se*. That, as a maxim, handed down from the Roman Code, meant that the agency of the servant was an instrument of his employer. Any man having authority over another's actions, who commands him to do an act, or who may be deemed to have impliedly commanded him, in the ordinary course of his employment, or business, becomes responsible for his acts, as for his own. The injustice, however, of applying this principle to a situation where a person is engaged in doing a piece of work, under an employment or a contract, in the performance of which he uses his own means and his own servants, without any control upon the part of the general employer, became apparent. It was evident that the relation of master and servant did not exist, when the relation between the parties was governed by such an engagement or contract. Whereas, under the operation of the rule, *respondeat superior*, the injured person might hold the master responsible and disregard the servant, who was the immediate author of the injury; under the introduction of the reasonable modification of that rule, the independent contractor, and not the general employer, became responsible for negligent acts, committed in person, or by those under his orders.

The principle of the decision below, in the present case, in my judgment, in no respect weakens the doctrine of the exemption of the general

employer from liability for damages caused by the negligence of the independent contractor; nor, in any wise, threatens its stability. Nor does it affect it, otherwise than by establishing a reasonable safeguard against too broad a claim for exemption. It seems to me a proposition, as clear as it is reasonable, that the assumption that there has been an exercise of due care in the selection of a competent and careful contractor, is a part of the foundation for the doctrine. I do not think that it would do to hold that a person, by the mere act of employing a contractor to do some work of a nature in itself obviously hazardous to others, thereby discharges himself of all responsibility. Something more is required of him. With that due regard for his neighbor's rights, which is obligatory upon all, in the use which they make of their own property, he should be held to the exercise of reasonable care and of some deliberation in the selection of a contractor. We are referred to decisions of the courts of other states, where this duty on the part of a general employer seems to have been distinctly recognized (*Norwalk Gas Light Co. v. Borough of Norwalk*, 63 Conn. 495; *Brannock v. Elmore*, 114 Mo. 55), and while precisely a similar case to this may not be found in our reports, the reasonableness of the proposition commends and sustains it. As I have suggested, it may be assumed as an inherent element of the employer's claim for exemption. See Wharton on Negligence, sec. 181; Story on Agency, 9th ed. sec. 454a, at p. 556, note; *Cuff v. R. R. Co.*, 35 N. J. Law, 17; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Sturges v. Theological Education Society*, 130 Mass. 414. In the text books and cases just referred to, it will be observed that the assumption I mention is recognized as one associated with the employment of an independent contractor. I do not think it needs much argument to vindicate the entire propriety of the assumption. The exemption from liability should not be so broad as to exclude the consideration of the manner in which the independent contractor was selected for the particular work. When we consider the hazards incident to the work of blasting, in a city block, there ought to be no question, where the work is obviously and necessarily of a dangerous nature, as to the propriety of imposing upon the owner of the property to be improved thereby a legal duty to exercise proper care in the selection of his contractor. If that be true, then the question of the exercise of due care becomes one of fact upon the evidence. If there is evidence proving, or tending to prove, that the contractor was an incompetent, or a reckless, or an unfit person to be entrusted with the job and that it was possible for the defendant to have discovered these facts by inquiry, then it is for the jury to render their verdict upon the issue between the parties. It is not essential that the defendant be shown to have known of the acts of incompetency, or of the conduct from which unfitness may be inferred. It is sufficient if it appear that no sufficient inquiry had been made, and that a careful inquiry might have revealed

the incompetency or the unfitness. The circumstances of the selection of the contractor might be such as to justify a belief that there was a failure to exercise care and prudence in the matter.

The conclusion, therefore, which I reach after a careful consideration of the question is that the defendant, in employing a contractor to blast out the rock upon his premises, a work obviously dangerous to the adjoining owner, owed a legal duty to the plaintiff to carefully select one who was both competent and careful and that for a failure to perform that duty, under the circumstances of this case, he became responsible for any injury to the plaintiff's property resulting from the contractor's negligence. I think that there was evidence adduced, from which the jury might infer that the defendant had not proceeded with that care and due regard for the plaintiff's rights, which were incumbent upon him. It may not have been strong; but it cannot be said that there was none giving rise to inferences. Minds might differ upon the question; but that only goes to show the necessity of leaving it to the arbitrament of a jury. The learned justices below have thought that there was a question for the jury upon the evidence. I think that they were right and that there are no errors calling for a reversal of this judgment.

PARKER, CH. J., O'BRIEN and VANN, JJ., concur with MARTIN, J., for reversal; BARTLETT and HAIGHT, JJ., concur with GRAY, J., for affirmance.

Judgment reversed and a new trial granted, with costs to abide the event.

JOINT TORT-FEASORS.

CITY OF PEORIA V. SIMPSON.

(110 Illinois, 294.—1884.)

SCOTT, J. This was an action to recover for personal injuries, and was brought by Robert Simpson, against the city of Peoria and Magnus Densberger. It is averred in the declaration that defendant Densberger was the owner of the premises situated on Water Street, in the city of Peoria, at the place where plaintiff was injured; that there was an opening into the cellar or vault in front of the premises, the covering to which constituted a part of the usual sidewalk; that the owner of the premises wrongfully and negligently permitted such opening to be and remain insufficiently and defectively covered, whereby the sidewalk was left in an unsafe condition; and that at that time, and prior thereto, the city was possessed of and had control of the sidewalk in front of the premises, and ought to have kept the same in good repair

and safe condition. It is then further averred as a ground for recovery, that both defendants, knowing the unsafe and dangerous condition of the sidewalk, wrongfully and negligently suffered the covering to such opening to remain in an insecure and unsafe condition, so that while plaintiff was passing over the sidewalk, in the observance of due care, it broke, and he fell through the opening, into the cellar or vault, and thereby sustained severe injuries, by which he became paralyzed in his back and arm. * * * Separate demurrers filed by each defendant were overruled by the court, and thereupon pleas of not guilty were filed by each defendant. A trial was had before a jury, who returned a verdict finding the issues for plaintiff, and assessing his damages at \$6000. Motions for a new trial and in arrest of judgment were severally overruled, and the court entered judgment on the verdict. That judgment was afterwards affirmed in the Appellate Court for the Second District. The case comes to this court on the appeal of the city of Peoria, and since then defendant Densberger has also assigned errors on the same record.

* * * * *

A question not entirely free from doubt is, can the owner of the premises and the city be held jointly liable for the injuries to plaintiff in the same action. It is said this question cannot now be considered, for the reason defendants did not stand by their demurrers, the rule being familiar that a party may not at the same time plead and demur to the same pleading. It is also true any substantial defect in a declaration can always be taken advantage of by a motion in arrest of judgment, and that was done in this case.

It will be observed both defendants are charged with negligence as to the condition of the sidewalk that occasioned the injury to plaintiff, and why may they not be jointly liable in the same action? The owner is liable, if at all, because the premises were let with the nuisance upon them, and that liability, if any existed, continued, notwithstanding the possession of the tenant, and continued up to the time of the accident. On the hypothesis the city had notice, it was the duty of the municipal authorities to make repairs at and before the injury to plaintiff. The same duty rested upon the owner and the municipality, at the same time, to make such repairs, and both may therefore be said to be guilty of negligence in respect to the same thing. Had the action been brought against the owner and the tenant, no doubt it could have been maintained had it been averred and proved both were under obligations to make repairs, and both were guilty of negligence in that respect. The averment is, it was the duty of both the owner and the municipality to repair the sidewalk, and both are charged with the omission of a common duty in that regard,—and what reason is there

why they may not be joined in the same action? Undoubtedly the rule is, for separate acts of trespass separately done, or for positive acts negligently done, although a single injury is inflicted, the parties cannot be jointly held liable to the party injured. If there is no concert of action—no common intent—there is no joint liability. This rule is very well settled by authority: Hilliard on Torts, sec. 10, p. 315; *Nav. Railroad and Coal Co. v. Richards*, 57 Pa. St. 142; Shearman & Redfield on Negligence, 58; *Bard v. Yohn*, 26 Pa. St. 482.

But a different principle applies where the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them. In such cases the party injured may have his election to sue all parties owing the common duty, or each separately, treating the liability as joint or separate. A familiar case illustrating the principle is, where a person is injured by the falling of a party wall erected on the dividing line between two lots owned by different persons, the action is maintainable jointly against both owners. It is for the reason it was a common duty of both owners to make the repairs. Another instance is, where a passenger is injured by a negligent collision of the trains of two railroad companies, he may maintain one action against both. And so it has been held an action may be maintained jointly against towns, where the law will authorize such an action, for an injury resulting from the insufficiency of a bridge which both towns are under an obligation to maintain. *Klauder v. McGrath*, 36 Pa. St. 128; *Colegrove v. N. Y., B. N. and N. H. R. R. Co.*, 6 Duer, 382; *Same v. Same*, 6 Smith (N. Y.) 492; *Peckham v. Burlington*, 1 Vt. 34. In *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491, it was held, where the negligent acts of two defendants combined to produce the injury to plaintiff, a joint action could be maintained against both negligent parties.

It will be seen the rule recognized rests on sound principle,—that is, where an injury results from the concurrent negligence of several persons, all being under a common duty to observe care, though that duty is separate with reference to that which causes the injury, all are jointly liable. Applying this principle to the case being considered, it would seem to be conclusive as to the point made that the city and the owner are not jointly liable for the injury to plaintiff. If it shall be ascertained it was the duty of both the owner and the city to keep the sidewalk in repair, then the failure to do so was a common neglect, and the case comes precisely within the principle stated. Whether both or either party was under such duty, depends on facts to be found by the jury in the trial court.

As respects the point suggested whether the city could recover against the owner in case it was compelled to pay the judgment, is a question that does not affect the principle being considered. How the law may

be on that subject need not now be determined. It is a question in which plaintiff can have no interest. As was said in *Bryant v. Bigelow Carpet Co.*, *supra*, the question of their relative rights and liabilities will be left to future litigation or adjustment between defendants. It is enough that it appears both defendants may have been guilty of negligence in regard to that which caused the injury to plaintiff, to enable him to maintain his action against them jointly.

* * * * *

Judgment reversed.

FENEFF v. BOSTON & MAINE RAILROAD.

(196 Massachusetts, 575.—1907.)

BRALEY, J. * * * In avoidance of this liability the defendant New York Central and Hudson River Railroad Company urges that two or more wrongdoers cannot be held jointly, unless, either in fact or by intendment of law, they coöperate in the perpetration of the wrong, as otherwise there would be a misjoinder of separate causes of action. Undoubtedly this is the general rule where two or more persons voluntarily unite in the act which constitutes the wrong, or the act is committed under such circumstances that they reasonably may be charged with intending the injurious consequences which follow. We refer only to a few illustrative cases. *Brown v. Perkins*, 1 Allen, 89; *Stone v. Dickinson*, 5 Allen, 29; *Barden v. Felch*, 109 Mass. 154; *Levi v. Brooks*, 121 Mass. 501; *Bath v. Metcalf*, 145 Mass. 274, 276; *Martin v. Golden*, 180 Mass. 549; *Parsons v. Winchell*, 5 Cush. 592; *Hawkesworth v. Thompson*, 98 Mass. 77; *Banfield v. Whipple*, 10 Allen, 27; *Mulchey v. Methodist Religious Society*, 125 Mass. 487, 489; *White v. Sawyer*, 16 Gray, 586, 589; *Pervear v. Kimball*, 8 Allen, 199, 200; *Swain v. Tennessee Copper Co.*, 111 Tenn. 430; *Hill v. Goodchild*, 5 Burr. 2790. It has been said by an eminent legal author that "in respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities." 1 Cooley on Torts (3d ed.) 246. See Pollock on Torts (7th ed.), 194. But whatever diversity of opinion there may be elsewhere, the law here must be considered as settled, that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable. *Boston & Albany Railroad v. Shanly*, 107 Mass. 568, 579; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491, 503; *Corey v. Havener*,

182 Mass. 250; *Oulighan v. Butler*, 189 Mass. 287, 293; *Flynn v. Butler*, 189 Mass. 377. A corresponding liability under similar conditions has been sustained in other jurisdictions. *Colegrove v. New York, New Haven & Hartford Railroad*, 20 N. Y. 492; *Barrett v. Third Avenue Railroad*, 45 N. Y. 628, 631; *Lynch v. Elektron Manuf. Co.*, 94 App. Div. (N. Y. 408; *Tompkins v. Clay Street Railroad*, 66 Cal. 163; *Cuddy v. Horn*, 46 Mich. 596; *Matthews v. Delaware, Lackawanna & Western Railroad*, 27 Vroom, 34; *Electric Railway v. Shelton*, 89 Tenn. 423; *Wilder v. Stanley*, 65 Vt. 145; *McClellan v. St. Paul, Minneapolis & Manitoba Railway*, 58 Minn. 104; *Allison v. Hobbs*, 96 Maine, 26, 28, 29; *Wabash, St. Louis & Pacific Railway v. Shacklet*, 105 Ill. 364; *Graves v. City & Suburban Telegraph Association*, 132 Fed. Rep. 387. The cases of *Parsons v. Winchell*, 5 Cush. 592, *Mulchey v. Methodist Religious Society*, 125 Mass. 487, *Harriott v. Plimpton*, 166 Mass. 585, *Mooney v. Edison Electric Illuminating Co.*, 185 Mass. 547, and *Fletcher v. Boston & Maine Railroad*, 187 Mass. 463, upon which the defendant relies as establishing a different rule, are to be distinguished. The first two decided that a master cannot be held responsible jointly with his servant nor a principal with his agent, for a tort committed by the servant or agent, when acting within the scope of their employment. In the third case, the joint action failed because no proof appeared of any coöperation between the defendants to procure a breach of the plaintiff's contract of marriage, while in the fourth, the measure of damages as well as the degree of liability being different and distinct as to the different defendants, the liability was said to be several. If, in the remaining case, it could have been said that the accident was chargeable solely to the railroad company, upon whom primarily rested the contractual duty of safely transporting the plaintiff and whose breach of this duty was the proximate cause of the injury, yet the decision in favor of the defendants well might rest, as the opinion states, upon his contributory negligence. In the present case the wrongful act was unintentional and arose solely from the concurrent negligence of the defendants, and, while it cannot be said that there was any concerted action, yet their combined carelessness in the simultaneous performance of unconnected duties produced a single injury to the plaintiff. It thus becomes impossible to ascertain whether one defendant rather than the other was the efficient cause of the wrong to which each contributed.

The plaintiff, therefore, is entitled to prosecute his suit to final judgment against both defendants, although he can have but one satisfaction in damages. *Oulighan v. Butler*, 189 Mass. 287, 293, and cases cited.

The verdict in their favor having been improperly directed, in accordance with the agreement of the parties, judgment is to be entered for the plaintiff in the sum of \$600. So ordered.

(a) ASSESSMENT OF DAMAGES.

HILL v. GOODCHILD.

(5 Burrows, 2790.—1771.)

THIS was a writ of error from the Court of Common Pleas. It was twice argued: first, on Tuesday, 23d April, 1771, by Mr. Morgan for the plaintiff in error, and Mr. Walker for the defendant in error; and again on Tuesday, 4th June, 1771, by Mr. Wallace for the plaintiff in error, and Mr. Dunning for the defendant in error. The roll in C. B. is No. 632. The pleadings were in substance as follows: trespass *vi et armis*, brought in C. B. by Goodchild against Hill and Winsey, for an assault and battery. The defendants plead "Not guilty;" and issue is joined thereupon. The jury find them guilty; and assess damages against Hill (besides costs and charges), to 40s., and for costs and charges, 40s., and they assess damages against Winsey, to one shilling only. And the judgment is, that the said Charles Goodchild do recover against Hill, the damages aforesaid to four pounds, and also £23 for his costs *de incremento*; in all, £27; and that he do recover against Winsey, the damages aforesaid to one shilling, and also one shilling for his costs; in all, two shillings.

The defendants brought a writ of error: and several errors were assigned; and particularly, that the jury had given damages against the defendants severally and distinctly for one joint trespass; whereas the damages ought to have been joint, and not several. And the Court have given judgment against them to recover several and distinct damages for one joint trespass.

The Court observed, that there was a very great confusion in the cases upon this subject, which ought to be carefully looked into, and settled. Some of them are diametrically opposite. And Mr. Justice ASTON added, that some of them were determined upon principles not agreeable to his understanding. LORD MANSFIELD observed, that in fact all the defendants may be guilty; and yet the degrees of their guilt may be different; but the present question is whether upon a charge of a *joint* trespass, the jury can assess damages according to different degrees of guilt; though the real justice is, that the damages should be respectively assessed in proportion to the real injury done by each defendant. This is a question that is of general experience, and concerns all the courts in Westminster-hall. It is a strange thing that a matter which happens every day should be attended with such difficulties. Neither side of the determination will reconcile the cases. However, we will consider of it. *Cur. advis.*

And now Lord MANSFIELD delivered their opinion.

We hold that, as the trespass is *jointly* charged upon both defendants, and the verdict has found them both *jointly guilty*, the jury could not afterwards assess several damages. His lordship particularly mentioned the cases of *Austen v. Wilward*; the 5th resolution in *Sir John Heydon's case*; the case in Cro. Jac. 118; of *Crane and Hill v. Hummerstone*; the case of *Rodney v. Strode*, in Carthew 19, and Jenkins's Centuries, 317, pl. 10, as warranting this opinion.

We do not think that the present case calls for an opinion upon those cases where the defendants are charged jointly and severally; or where the defendants plead severally; or where the defendants are found guilty of several parts of the same trespass or at a different time; or where a joint action is brought for two several trespasses, and the damages found severally, as being severally guilty. We don't meddle with any of these cases: there is a variety of opinions in the books relating to them. It is enough for us to found our present determination upon the present case. And the present case is, that the count is of a *joint* trespass; and the jury have found the defendants guilty of a *joint* trespass, and yet have severed the damages.' We are of opinion that, in *such* case, the damages *can't be severed*.

The consequence is, that the judgment must be reversed.

Judgment reversed.

HALSEY v. WOODRUFF.

(9 Pickering, 555.—1830.)

TRESPASS against Halsey and Avery for entering Woodruff's close and pulling down a blacksmith's shop; with counts for carrying away the materials.

The defendants plead severally the general issue.

The jury find "that the said Avery is guilty in manner and form as the plaintiff has alleged, and assess damages against said Avery at two dollars, and the jury also find that said Halsey is guilty in manner, &c., and assess damages against said Halsey at seventy-five dollars."

The plaintiff elected to take judgment against both defendants for the greater damages, and entered a *remittitur* as to the lesser damages.

The defendants sued out a writ of error, assigning for error, that although the jury which tried the case returned a separate verdict of seventy-five dollars against Halsey and also a separate verdict of two dollars against Avery, the Court rendered a judgment against both for the sum of seventy-five dollars and costs.

PER CURIAM. We think the judgment was rightly entered. The result of the authorities, which are numerous, is, that where a joint action is brought against two for a trespass done, and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must necessarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass, without regard to different degrees or shades of guilt. *Heydon's case* cites many of the authorities, the effect of which is given in *Tidd*, that where the action is brought against several defendants and the jury assess several damages, the plaintiff may enter a *remittitur* as to the lesser damages and take judgment against all who are guilty of the joint trespass, for the greater damages. And this is founded on a sufficient reason. Each defendant is liable for the whole damages of a joint trespass. A release to one discharges both, and the reason is, that the damage is joint. The plaintiff here alleges a joint trespass. The defendants plead severally, that they are not guilty—of what? of the joint trespass; and they are found guilty—of what? of the same joint trespass. Damages are assessed against one at seventy-five dollars; this therefore, by the finding of the jury, is the damage which the plaintiff has sustained, and the law draws the inference that both are liable for that sum. The inquiry of damages, though made by the same jury, when an issue in fact is tried, is in some degree collateral to the trial of the issue. Where there is judgment on an issue of law alone, there must necessarily be a distinct inquiry of damages, and then the question for the jury is only what damages has the plaintiff sustained, by reason of the trespass done, without regard to the particular acts done by either of the defendants. So where the damages are found by the jury, on an issue in fact, the sole inquiry open to them is, what damages the plaintiff has sustained, not who ought to pay them; and therefore their finding of separate damages is beyond their authority and merely void. Suppose in an action against two for a joint trespass, one of the defendants demurs to the declaration, and the declaration is sustained, and the other pleads the general issue, which is found against him and damages are assessed; judgment would be rendered that both were guilty, and execution would issue against both for the damages so found by the jury. On principle, as well as authority, the judgment entered in the case before us was correct.

Judgment affirmed.

KEEGAN v. HAYDEN.

(14 Rhode Island, 175.—1888.)

DURFEE, C. J. This is a petition for the new trial of an action of trespass against three several defendants for assault and battery and false imprisonment. The defendants pleaded jointly—First, the general issue; and, second, a special plea in justification that they were police constables of the city of Providence, and as such arrested the plaintiff for intoxication in the public streets of said city, and detained him for trial, the said arrest and detention being the trespasses complained of. The jury on trial returned a verdict for the plaintiff against them all jointly for \$500. One of the grounds assigned for new trial is that the jury did not discriminate between the defendants, but assessed them all jointly for the full amount of the damages. We do not find any error in this. The rule is that, in an action of tort against several who are jointly charged, the verdict ought to be rendered against all who are proved guilty as charged, without any apportionment of the damages, each and all of them being alike liable for the wrong to the fullest extent, in whatever different degrees they may have contributed to it. *Hill v. Goodchild*, 5 Burrows, 2790; *Hume v. Oldacre*, 1 Starkie, 351; *Berry v. Fletcher*, 1 Dill. 67; *Sprague v. Kneeland*, 12 Wend. 161; *Halsey v. Woodruff*, 9 Pick. 555; *Fuller v. Chamberlain*, 11 Metc. (Mass.) 503; *Currier v. Swan*, 63 Me. 323; *Clark v. Bales*, 15 Ark. 452; *Hair v. Little*, 28 Ala. 236; *Bell v. Morrison*, 27 Miss. 68; *Beal v. Finch*, 11 N. Y. 128. The defendants also ask for a new trial because the verdict is against the evidence, and the weight thereof, and because the damages are excessive. The evidence is conflicting, but we are not prepared to set the verdict aside for the first of these two reasons. We think, however, that the damages are excessive, for, according to the evidence, the peace of the street had been disturbed, and the plaintiff, if not indecently drunk, had been drinking enough to make him excitable and abusive. A new trial will therefore be granted, unless the verdict is reduced to \$300.

(6) ACCORD AND SATISFACTION.

RUBLE V. TURNER.

(2 Hening & Munford, 38.—1808.)

JAMES TURNER, Joel Motley, and three other persons having committed a joint assault and battery on Thomas W. Ruble, a writing was executed by the latter to the said Motley only, on the 30th of October 1799, in the following words: "I do hereby acknowledge, that Joel Motley's paying my expenses at Mount Relief with Captain Alexander Hunter shall be satisfaction for the part he the said Motley took in an assault and battery committed upon me at said Mount. Provided this shall not be considered as any satisfaction in favour of Joseph Nunn, Stephen Maynor, James Turner, or Archibald M'Nanny, who were guilty of the same at the same time and place.

"Alex. Hunter.

"THO. W. RUBLE.

"Patty Hunter.

"Oct. 30, 1799."

On the 22d of April, 1801, Ruble brought a joint action of assault and battery against all the five trespassers in the District Court of Franklin; but the process appears to have been served on James Turner, Joseph Nunn and Stephen Maynor only; who pleaded not guilty and *son assault demesne*; and issues were thereupon joined. At the trial, the plaintiff and those defendants agreed, that the paper, of which the above is a copy, "should be used, in the same manner, on the issues made up in the cause, as if the same had been regularly pleaded;" whereupon the defendants by their counsel moved the court to instruct the jury, "that the said paper discharged the whole of the defendants from the action of the plaintiff, it being for the same cause stated in the paper aforesaid;" which the Court accordingly did; to which opinion of the Court the plaintiff filed a bill of exceptions; and (a verdict and judgment having been entered against him), obtained a writ of *supersedeas* from one of the Judges of this Court.

TUCKER, J. * * * The agreement between the parties, that this paper should be used as if it had been pleaded, admits it to have been pleaded properly, so as that an issue on the merits might have been fairly joined upon it; and, consequently, waives all such objections as might have been made by a demurrer. The proper plea (the paper not being under seal) would have been accord and satisfaction, which is a good plea in trespass, and in all actions which suppose a wrong *vi et armis*:

* * * * *

The next question is, whether an accord with, and satisfaction received from, one joint trespasser, will, like a release, operate as a bar to a recovery against the other joint trespassers.

As every deed, in order to render it effectual, must be founded either upon a good, or a valuable consideration, the reason why a release operates as a bar to an action for an injury done, is the consideration, either good in law, or valuable, which moves to the release. This is the essence of the deed, without which it would be void. So an accord, without satisfaction, which is analogous to the consideration in a deed, would be merely void; but, when satisfaction is made, like a valuable consideration in a deed, it gives effect to the instrument; and (by analogy to a release) satisfaction (which implies full reparation for the injury sustained) being received from one of the joint trespassers, shall discharge the whole.

* * * * *

But it is contended, that the proviso, that it should not be considered as a satisfaction in favor of the other defendants, makes a distinction between this and the case of an accord and satisfaction generally, and therefore no bar to a recovery against them.

It is a rule of construction that, if there be any clause or condition in a deed, which is either contrary to law, or repugnant to the nature of the estate created, it is void. 2 Bl. Com. 155. Now here the question is, whether, by the first clause in this instrument of writing, Joel Motley was thereby discharged, and the plaintiff barred of his action against him: and I hold that he was, for the reasons already given. What then is the effect of this? The law says, that if one joint trespasser be released, or make accord and satisfaction, it shall bar a recovery against all the others. The plaintiff can no more change the law, in this particular, by any subsequent proviso or condition, than he could, after a grant in fee-simple, by deed, restrain his grantee from selling the lands, or change the course of descents prescribed by law; neither of which will it be contended that he could do. The proviso then is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the defendants.

I am therefore of opinion, that the judgment be affirmed.

*Judgment affirmed.*¹

¹ Concurring opinions by ROANE and FLEMING, JJ., omitted.

SNOW V. CHANDLER.

(10 New Hampshire, 92.—1839.)

THIS was trespass, for assaulting and beating the plaintiff on the 4th day of September, 1838.

The case was tried on the general issue, and a brief statement filed, alleging that the trespass, if any, was committed by the defendant and one George Holt; and that the plaintiff received and accepted of said Holt the sum of twenty dollars, in full satisfaction of said trespass.

The trespass alleged was proved. The defendant, in support of his brief statement, proved that a few days after the occurrence, the mother of said Holt, he being a minor, applied to one White to procure a settlement with the plaintiff for the injury he had received—that White went to the plaintiff and his father, for the purpose, and after some conversation between them on the subject, the plaintiff and his father refused to settle, except upon the conditions and to the extent following, to wit:—That he, White, might leave with them twenty dollars, and in case they should think proper, at any future time, to prosecute Holt, they should be at liberty to do it on refunding the sum so paid:—to which the said White agreed, and the money was paid accordingly. It also appeared that before and at the time of receiving the money, the plaintiff and his father declared they would not settle with Chandler for five hundred dollars.

It was admitted that the twenty dollars had never been refunded.

The counsel for the defendant requested the court to instruct the jury, that the payment of the twenty dollars was a bar to any suit against Holt for the assault, until said twenty dollars was refunded, and that if the plaintiff is barred from a suit against Holt, he cannot, so long as that bar exists, maintain an action against Chandler, he being a joint trespasser; but the court declined thus to charge the jury, but instructed them that the twenty dollars so paid and received as aforesaid was not a bar to this action, but must be considered in part payment of the damage sustained by the plaintiff by said assault and battery; and that, should they find the plaintiff entitled to a larger sum, they would render a verdict for the balance; but in case they should find the twenty dollars an adequate compensation for the injury the plaintiff sustained, they would find a verdict for the defendant.

The jury returned a verdict in favor of the plaintiff, for eighty dollars. The defendant excepted to the ruling of the court, and moved for a new trial.

UPHAM, J. In this case the strongest ground on which the defendant

can place his defence is, that the contract with Holt, by which the twenty dollars was received, was a covenant not to sue *him*; and it is argued that if this agreement can have such effect, it bars the plaintiff from a suit against either trespasser. But we are not aware that this result necessarily follows.

* * * * *

The general rule, also, as stated in the case in *Greenleaf*, as to joint debtors, may well be applied in case of joint trespassers, viz., that nothing short of payment of damage by one of two joint trespassers, or a release under seal, can operate to discharge the other trespasser.

If so, a covenant not to sue Holt would avail nothing in defence to this action, and nothing short of payment by him for the damage sustained can discharge this defendant.

No release of damages was here given; and the only question is, whether the sum paid him was in satisfaction of the damage incurred. If it was not so *received*, it is clear that the claim is not discharged.

The evidence is, that at the time of receiving the money from Holt, the plaintiff declared that he would not settle with Chandler for five hundred dollars. The substance of the arrangement betwixt the plaintiff and Holt seems to have been this: that the plaintiff was willing to receive a small portion of the damage from Holt, either for the reason that he conceived him to be less to blame than the defendant, or that he was less able to pay his proportion of the damage; and on condition of receiving this sum the plaintiff engaged to pursue the defendant for the remainder of his claim. It is clear that the sum paid was not received in *satisfaction* of the damage, but only in *part satisfaction*; and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a partial satisfaction of the damage, and the plaintiff may sue or omit to sue whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such an arrangement. He remains liable for the whole damage, until satisfaction is made.

If the individual receiving the injury sees fit to *visit* the penalty upon any *one* guilty individual rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve to deter him from such wrongful acts. At the same time, any partial payment by a cotrespasser avails so far for his benefit. Such was the ruling in this case. To this extent the defendant can avail himself of the plaintiff's arrangement with his cotrespasser, but there was nothing in that contract which constitutes a bar to this suit. There must, therefore, be

Judgment on the verdict against the defendant.

(c) *RELEASE OF ONE.*

COCKE V. JENNOR.

(Hobart, 66, pl. 69.)

THOMAS COCKE brought an action of trespass against Kenelme Jennor for breaking his house at Dunmow, and beating him the last day of October, in the tenth year of the king. The defendant pleads that he together with one Robert Milborne in the time of the trespass supposed, did jointly break the plaintiff's house, and beat him, and that afterwards, on the thirteenth day of June, 11 Jac. R., the plaintiff did release unto the said Milborne by his writing, which the defendant shows in Court, all actions, real and personal, &c., and avers that the trespass whereof the plaintiff complains, and which he and Milborne did jointly *est una et eadem, et non alia neque diversa*. Whereupon the plaintiff demurred, and it was adjudged for the defendant, for though a trespass be joint and several to this purpose that he may sue either one or all, yet when two join in a trespass, they so make one trespasser as either of them is as well answerable for his fellow's fact as for himself. And therefore a release to one dischargeth the whole trespass. And also a release is as good a satisfaction in law as a satisfaction indeed; and therefore if an executor release, the debt released is judged assets in his hand. Now against joint trespassers, there can be but one satisfaction, and therefore if they be sued in one action, though they may sever in pleas and issues, yet one jury shall assess damages for all; and as to the damages, he that is no party to the issue shall have an attaint as well as his fellows, and if they be sued in several actions, though the plaintiff make choice of the best damage, yet when he hath taken one satisfaction, he can take no more, and if he require two, an *audit. quer.* will lie.

GUNTHER V. LEE.

(45 Maryland, 60.—1876.)

ALVEY, J. The three defendants in this action were sued as joint tort-feasors, and the single question presented is as to the effect and operation of the release executed by the plaintiffs to one of the defendants, Mrs. Lee, during the pendency of the suit. The terms of the release are exceedingly broad and comprehensive, though it was declared that it was not to prejudice or impair the plaintiff's claim against the

other two defendants. The release was executed in consideration of five hundred dollars, and in terms released and discharged Mrs. Lee from all claims of every description, for damages accruing or accrued by reason of the wrongs complained of; the plaintiffs thereby acknowledging themselves "to be fully paid and satisfied for all and singular the trespasses complained of" by them in the suit then pending against the three defendants jointly. The court below instructed the jury that the release inured to the benefit of all the defendants, and was therefore an answer to the action, which instruction we think was properly given.

The law, as settled in England, is that a judgment in an action against one of two joint tort-feasors, of itself, without satisfaction or execution, is a sufficient bar to an action against the other for the same cause. The leading cases upon this subject are *Brown v. Wootten*, Yelv. 67; *King v. Hoare*, 13 M. & W. 494; *Brinsmead v. Harrison*, L. R. 6 C. P. 584; and same case in Ex. Ch. L. R. 7 C. P. 547.

This rule, however, to the full extent stated, is not generally accepted by the courts in this country. The opinion of KENT, C. J., in *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330, has been most generally adopted which is to the effect that a recovery against one of several joint tort-feasors is not of itself, without satisfaction, a bar to the right to recover against the others, but fully conceding that satisfaction received of one is a complete bar to recovery against the others. The principle of *Livingston v. Bishop* has been fully sanctioned by the Supreme Court of the United States in the case of *Lovejoy v. Murray*, 3 Wall. 1. But, without determining which rule we should be disposed to adopt, if the precise question were presented, with respect to the question presented on the record before us, there is no conflict of authority whatever. All the cases, both English and American, maintain the doctrine that satisfaction from one joint tort-feasor, whether received before or after recovery, extinguishes the right as against the others. The plaintiff is not entitled to receive more than one satisfaction for and in respect of the same injury. As was said by the court in *Lovejoy v. Murray*, when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected, in equity and good conscience, that the law will not permit him to recover again for the same damages. And as a consideration is always implied in a release under seal, though not expressed on its face, the release by deed of one joint trespasser will discharge all; and this has been the law from very early times. Littleton, § 376; Co. Litt. 232; *Cocke v. Jennor*, Hob. 66; 7 Robinson's Prac. 206-208, and cases there referred to; *Ruble v. Turner*, 2 Hen. & M. 38; *Gilpatrick v. Hunter*, 24 Me. 18; *Thurman v. Wild*, 11 Ad. & El. 453. Here the release expresses the consideration on its face, which was received in full satisfaction of the wrong complained of. The proviso in the release, by which the right to recover

for the same injury against the other two defendants was attempted to be reserved to the plaintiffs, is simply void, as being repugnant to the legal effect and operation of the release itself. *Ruble v. Turner*, 2 Hen. & M. 38. The judgment must therefore be affirmed.

Judgment affirmed.

(d) *RESERVATION OF RIGHT TO SUE.*

CAREY V. BILBY.

(63 United States Circuit Court of Appeals, 361.—1904.)

Two actions by Bilby to recover damages for false representations. The complaint stated that Carey and C. J. Hysham, by means of false representations, sold certain cattle to Bilby; and that Bilby incurred a large loss by reason of the false representations; viz., \$15,840 in the first case, and \$4580 in the second case.

The complaint admitted that plaintiffs had been paid by C. J. Hysham on account of the damages claimed in the first case the sum of \$2229; and on account of the damages claimed in the second case the sum of \$771; leaving a balance of damages due plaintiffs in the first case of \$13,611 and in the second case a balance of \$3809.

Defendant alleged that the said sums paid were received and accepted by plaintiffs in full satisfaction and discharge of their claims.

At the trial, the receipt signed by plaintiffs was introduced in evidence, viz.:—

“Now, therefore, in consideration of the sum of \$3000, to me in hand paid by T. J. Hysham and C. J. Hysham, and the further consideration of the said T. J. Hysham and C. J. Hysham having assigned to me all claims and causes of action that they, or either of them have against the said Comer Bros., growing out of or in any way connected with the said purchase of said cattle from said Comer Bros., I, J. S. Bilby, fully release and discharge him, the said T. J. Hysham and the said C. J. Hysham, from any and all liability by reason of each, all, and every of the foregoing matters and things, and release him, the said T. J. Hysham and the said C. J. Hysham from any and all liability in any way connected with or growing out of the aforesaid matters. And I will indemnify, protect, and save harmless the said T. J. Hysham and the said C. J. Hysham from paying any further sum to any person or persons whatsoever, on account of any or all the matters set forth in this contract.

“But it is expressly and specifically understood in the execution and

delivery of this paper that I do not relinquish or release any action or causes of action that I may now or hereafter have against him, the said J. L. Carey, or them, the said Comer Bros., or either of them by reason of any of the matters or things hereinbefore recited, expressly and specifically reserve to myself the right to maintain in said action or actions against him, the said J. L. Carey, or them, the said Comer Bros., or either or all of them by reason of said matters and things or any of them that I now have or may hereafter have.

"Signed this second day of August, 1898.

JOHN S. BILBY."

The trial below resulted in a verdict in favor of the plaintiffs in case No. 1929 for the sum of \$2229 and in a verdict in favor of the plaintiffs in case No. 1930 for the sum of \$771, on which verdicts judgments were subsequently entered. The defendant below has brought the cases to this court on writs of error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the conclusion of the evidence on the trial below, counsel for the defendant requested a peremptory instruction to find a verdict in favor of his client. This instruction was asked, as it seems, on the sole ground that the release which had been executed by the plaintiff Bilby in favor of T. J. Hysham and C. J. Hysham operated as a release of the defendant, Carey, although it was not so intended, and that no action could be maintained against him in consequence of the execution of this instrument. The trial court denied the request, holding that the release in question did not have the effect claimed for it. It is conceded by counsel for the plaintiff in error that the only question for determination by this court is whether the trial judge was right in his view that the release did not operate as a discharge of the cause of action against Carey.

It is an old and well-established rule of law that the release of a cause of action as against one of two or more joint tort-feasors or joint obligors operates as a release of all. This is upon the theory that when one has received full compensation for a wrong, no matter from which wrongdoer or from what source, the law will not permit him to recover further damages. *Lovejoy v. Murray*, 3 Wall. 1, 17, 18 L. Ed. 129. When a release of a cause of action for a tort is given by the injured party to one of two or more persons who committed the wrong, the release is construed most strongly against the party executing it. The law indulges in the presumption that the release was given in full satisfaction for the injury, and upon a sufficient consideration, and will not permit the presumption to be overcome by oral proof to the contrary. *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 520, 36 Am. Rep. 830; *Bronson v. Fitzhugh*, 1 Hill, 185, 186. Sometimes, however, as in the case in hand,

a release executed in favor of one wrongdoer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently arisen, how shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrongdoers, or admitting that he has received full compensation for the injury? With reference to this question the authorities are not in accord. Some courts are disposed to hold, and have held, that when such an instrument contains apt words releasing one of the joint wrongdoers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released, is repugnant to the release in that it defeats, or attempts to defeat, the natural legal effect of the instrument; and that it should therefore be ignored. *McBride v. Scott et al.* (Mich.) 93 N. W. 243, 61 L. R. A. 445; *Abb v. Northern Pacific Ry. Co.* (Wash.) 68 Pac. 954, 58 L. R. A. 293, and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release operating to destroy his cause of action as against all of the joint tort-feasors, but rather as a covenant not to sue the party in whose favor the instrument runs. *Gilbert v. Finch*, (N. Y.) 66 N. E. 133, 61 L. R. A. 807; *Matthews v. Chicopee Mfg. Co.*, 3 Rob. 712; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; *Hood v. Hayward*, 124 N. Y. 1, 16, 26 N. E. 331; *Sloan v. Herrick*, 49 Vt. 327; *McCrillis v. Hawes*, 38 Me. 566; *Miller v. Beck* (Iowa), 79 N. W. 344, 345; *Price v. Barker*, 4 El. & Bl. 760, 776, 777.

We are of opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reason which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an ar-

rangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained; that it was not in fact full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey.

The judgments below are therefore affirmed.

GILBERT V. FINCH.

(173 New York, 455.—1903.)

APPEAL by the defendants from an order of the Appellate Division of the Supreme Court, which reversed a judgment in favor of the defendants below.

HAIGHT, J. This action was brought by the plaintiff, as receiver of the Commercial Alliance Insurance Company, against the defendants, as directors of that company, to recover the sum of \$10,000 and interest. The Commercial Alliance Insurance Company was incorporated under the laws of this state, and continued in business until October, 1894, when the plaintiff was appointed receiver in an action brought for that purpose by the attorney general of the state. The evidence taken upon the trial tends to show that, prior to the bringing of the action by the attorney general, the defendants, and other persons beyond the jurisdiction of the court, were acting as directors of the company, and that they entered into negotiations with the 10 surviving incorporators of the Maine & New Brunswick Insurance Company, a corporation organized under the laws of the state of Maine, for the purchase and control of that company; that such negotiations were finally consummated on the 3d day of May, 1893, by the president of the Commercial Alliance Company, who, acting in pursuance of the direction of the defendants and their associates, took from the funds of the company \$35,000, and paid the same to the 10 surviving incorporators of the Maine & New Brunswick Company, giving to each the sum of \$3,500, and taking from them a paper in which they purported to transfer and assign "all their right, title, and interest, as corporators, associates, or otherwise, in said Maine and New Brunswick Insurance Company." Simultaneously with the execution and delivery of this paper, and in pursuance of that

agreement, all of the officers and directors of the Maine Company resigned their places, and the same were filled by the defendants, or persons acting for or on their behalf. Shortly thereafter and on the 22d day of July, 1893, the Maine & New Brunswick Company was judicially declared by the supreme judicial court of Maine to be insolvent, and a receiver was appointed to wind up its affairs. After the plaintiff was appointed receiver of the Commercial Alliance Company, he brought an action against the 10 surviving incorporators of the Maine & New Brunswick Company in the United States circuit court for the district of Maine to recover back the \$35,000 which had been paid to them under the direction of the defendants. Subsequently this action was compromised under the direction of the court, the plaintiff receiving from such surviving incorporators the sum of \$25,000; and he thereupon executed and delivered to them an instrument in which he released and discharged all of the defendants in that action "from all claims or demands arising from said suit, or the subject-matter thereof, and also from all claims, demands, actions, and causes of action whatsoever in favor of said Commercial Alliance Insurance Company, or of myself as receiver of said company, to date. The execution of this instrument shall not affect any cause of action of the receiver against any person not named herein." It also appeared upon the trial that the defendant Miller had brought an action against the Commercial Alliance Company prior to the appointment of the plaintiff as receiver, in which he claimed that a large sum of money was due and owing to him from the company. This action was settled upon the payment to him of the sum of \$8,000, and thereupon mutual releases were exchanged between him and the company upon the consideration expressed therein of \$1.

We fully concur in the conclusions reached by the appellate division, to the effect that the transaction by which \$35,000 were taken from the treasury of the Commercial Alliance Company and paid over to the incorporators of the Maine & New Brunswick Company was *ultra vires*, and constituted a waste of the funds of the Commercial Company, and that the defendants, who authorized such appropriation of the moneys, became liable to respond to the plaintiff in damages. We also are of opinion that the appellate division properly disposed of the claim of the defendant Miller under his release.

There is but one question upon which we deem further discussion necessary. That arises out of the release given by the plaintiff to the Maine incorporators upon the settlement of the action against them for \$25,000. It is contended by the defendants, in the first place, that, if they are required to return to the plaintiff the \$35,000, which they paid, or caused to be paid, to the Maine incorporators, they would become, in equity, entitled to subrogation to the rights of the plaintiff, and entitled to recover the money which they had paid to the Maine

incorporators, and that the release would operate to deprive them of this right. In the second place, they contend that the release was a settlement of the entire claim, and that its effect was to discharge them, upon the theory that they were joint tort feors.

It is not our purpose to question the character or the motive of the defendants in carrying out the transaction. We may readily concede that they thought they were acting for the best interests of the company which they represented. They doubtless thought that by getting control of the Maine Company, and getting themselves installed as officers, they could get the policy holders in that company to transfer their insurance into the Commercial Alliance Company; but good motives and good intentions do not render the transaction valid, or relieve them from liability for the wrong which they have committed. The Maine incorporation was not a stock company. Its officers had no stock in the company which they could sell or transfer, and consequently there was nothing that the Commercial Alliance Company could purchase. The thing accomplished by the transaction was the resignation of the officers of the Maine Company, and the substitution of the defendants or their representatives. It was therefore a misappropriation of the moneys of the Commercial Alliance Company by the defendants and their associates, which operated to waste the funds of the company; and they thereby became wrongdoers, and, among themselves, joint tort feors. We are also of the opinion that the officers of the Maine Company also committed a wrong. If they, as officers of the Maine Company, could transfer any of the property of that company to the Commercial Alliance Company, they had no right, as such officers, to divide up the \$35,000 among themselves, and put it into their own pockets. If they had no property rights which they could transfer to the Commercial Alliance Company, then they had no right to take the money of that company and convert it to their own use, so that, as among themselves, they were joint tort feors. As to whether they were joint tort feors with the defendants, we do not deem it necessary to now determine, for it is our purpose to consider the question in both aspects.

If the defendants had paid the Maine incorporators \$35,000 of their own money to resign their position in that company, and have the defendants substituted in their places, we are aware of no equitable or legal principle upon which they could recover the money. They got what they purchased. They understood fully what the Maine officers had to transfer. In using the money of the Commercial Alliance Company, they committed, as we have seen, a wrong upon that company; and our attention has been called to no case in which equity has enforced the right of subrogation in such a case. Indeed, we had supposed the policy of the law to be to leave wrongdoers without aid in equity from

the burdens of the position in which they have placed themselves. The rule is well settled that, as among themselves, equity would not compel contribution or enforce subrogation. *Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18; *Thorp v. Amos*, 1 Sandf. Ch. 26, 34; *Pierson v. Thompson*, 1 Edw. Ch. 212, 218; *Wehle v. Haviland*, 42 How. Prac. 399, 410; *North v. Sergeant*, 33 Barb. 350, 354; *Weidman v. Sibley*, 16 App. Div. 616, 619. We consequently conclude that the principles of subrogation do not apply to the defendants in this case.

In considering the effect of the release, we shall assume that the defendants were joint tortfeasors with the Maine incorporators, and that the release, under seal, of a claim given to one joint tortfeasor, operates as a release of all. *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628, 635, and cases there cited. This rule is founded upon the theory that a party is entitled to but one satisfaction for the injury sustained by him. The claim of the plaintiff, as we have seen, was for \$35,000. The settlement was for \$25,000, leaving \$10,000 of the original claim unpaid and unsatisfied. The instrument given to the Maine incorporators, upon the settlement of the plaintiff's suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned, but it was expressly provided in the instrument that it should not effect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument, therefore, does not purport—neither was it intended—to be a full and complete settlement of the plaintiff's entire claim. Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudication by the courts. It is quite true that the courts of our sister states have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own state,—as, for instance, *Matthews v. Chicopee Mfg. Co.*, 3 Rob. (N. Y.) 712, and *Commercial Nat. Bank v. Taylor*, 64 Hun, 499, on one side and *Mitchell v. Allen*, 25 Hun, 543; *Delong v. Curtis*, 35 Hun, 94, and *Brogan v. Hanan*, 55 App. Div. 92, upon the other side. In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tortfeasors, a release given to one releases all; but, if the instrument contains a reservation of a right to sue the other joint debtors or tortfeasors, it is not a release, but, in effect, is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tortfeasor. In the case of *Duck v. Mayeu* [1892], 2 Q. B. 511, the question was as to whether the plaintiff had released a joint tortfeasor. He had accepted from one a sum of money, but without prejudice to his claim against the other. SMITH, L. J., in delivering the opinion of the court, said with reference thereto: "In

determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out; and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson v. Gosling*, at *nisi prius*, the same canon of construction was applied, and it was held that the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the court of common pleas, as reported in Law Rep. 7 C. P. p. 9." In *Price v. Barker*, 4 El. & Bl. 760, COLERIDGE, J., says: "With regard to the first question, two modes of construction are for consideration: One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt; the other, that, according to the modern authorities, we are to mold and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving their rights against parties jointly liable. We quite agree with the doctrine laid down by Lord DENMAN in *Nicholson v. Revill*, 4 Adol. & E. 675, as explained by Baron PARKE in *Kearsley v. Cole*, 16 Mees. & W. 136, that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities, (see *Solly v. Forbes*, 2 Brod. & B. 38; *Thompson v. Lack*, 3 C. B. 540; and *Payler v. Homersham*, 4 Maule & S. 423), to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." See, also, *Currey v. Armitage*, 6 Wkly. Rep. (Eng.) 516. In the case of *McCrillis v. Hawes*, 38 Me. 566, one Lewis and the defendant were charged as joint trespassers upon the plaintiff's premises. They had taken 100 sticks of pine timber. The plaintiff settled with Lewis for one half of the property taken, and brought action against the defendant for the other half. It was held that the action could be maintained, and that the settlement was not a release as to the whole claim. In the case of *Ellis v. Esson*, 50 Wis. 138, it was held that the instrument given to one of several joint wrongdoers is not a technical release if it appears from the paper that it was not the intention of the injured person to release his cause of action against all the wrongdoers, and that the sum received was not in fact a full compensation for his injury,

nor intended to be such by the parties to the agreement. In *Sloan v. Herrick*, 49 Vt. 327, it was held that the release of one joint tortfeasor on payment of part satisfaction, when it is expressed in the release that the sum paid is received only in part satisfaction, will not operate to bar the injured party from pursuing the other joint tortfeasor for so much of the tort as remains unsatisfied.

We have thus called attention to the English authorities and those of some of our sister states. We have also referred to some of the conflicting cases in our own courts. The question appears to have first received attention here in *Kirby v. Taylor*, 6 Johns. Ch. 250, 253, in which it was held that a release is to be construed according to the clear intention of the parties, and, where it contains a reservation, the other obligee was not discharged. In the case of *Irvine v. Millbank*, 56 N. Y. 635, more fully reported in 15 Abb. Prac. (N. S.) 378, the release was, by its terms, to be without prejudice to the rights of the plaintiff as against the other defendants. FOLGER, J., in delivering the opinion of the court, said that this instrument was not a technical release, which it must be to operate as a discharge of a joint tortfeasor. And finally, in the case of *Whittemore v. Judd Linseed & Sperm Oil Co.*, 124 N. Y. 565, the question was examined by BROWN, J., and the conclusion reached that, where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged. It thus appears that the decisions of this court are in accord with the English rule, and in harmony with our statute in reference to joint debtors. Code Civ. Proc., §§ 1942, 1944. They give force and effect to the intention of the parties to the instrument, which, we think, is more just, and the wiser and safer rule. Where the release contains no reservation, it operates to discharge all the joint tortfeasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants.

The order of the appellate division should be affirmed, and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

PARKER, C. J., and GRAY, BARTLETT, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Order affirmed.

(e) CONTRIBUTION.

ADAMSON V. JARVIS.

(4 Bingham, 66.—1827.)

BEST, C. J. A motion has been made in arrest of judgment *after verdict*. The plaintiff relies on the second count, on which only his verdict and judgment are to be entered.

Stripped of the technical language with which it is encumbered, the case stated on the second count is this: that the defendant having property of great value in his *possession*, represented to the plaintiff that he had authority to dispose of such property; and followed this representation by a request that the plaintiff would sell the property for him, the defendant. The plaintiff, believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant, sold the property; and after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right to make, and which the defendant appears to have allowed, paid the residue to the defendant.

The defendant, who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been, that the plaintiff, supposing, from the defendant's false representations, he had an authority which he had not, and, acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages and costs, whilst the defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.

It has been stated at the bar that this case is to be governed by the principles that regulate all laws of principal and agent:—agreed: every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him for all such acts as would *be lawful* if the employer had the authority he pretends to have. A contrary doctrine would create great alarm.

Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves

wrongdoers, and could not recover compensation from him who had induced them to do the wrong.

It was certainly decided in *Merryweather v. Nixan*, 3 T. R. 186, that one wrongdoer could not sue another for contribution; Lord KENYON, however, said, "that the decision would not affect cases of *indemnity*, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." This is the only decided case on the subject that is *intelligible*.

There is a case of *Walton v. Hamburg and others*, 2 Vern. 592, but it is so imperfectly stated, that it is impossible to get at the principle of the judgment.

The case of *Phillips v. Biggs*, Hardr. 164, was never decided; but the court of Chancery seemed to consider the case of two sheriffs of *Middlesex*, where one had paid the damages *in an action for an escape, and sued the other for contribution, as like the case of two joint obligors*.

From the inclination of the court on this last case, and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

If a man buys the goods of another from a person who has no authority to sell them, he is a wrongdoer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. This is proved by *Medina v. Stoughton*, 1 Salk. 210; *Sanders v. Powel*, 1 Lev. 129; *Crosse v. Gardner*, Carth. 90, 1 Roll. Abr. 91, l. 5, and many other cases.

These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action.

It has been said, that is because there is a breach of *contract* to rest the action on, and that there is no contract in this case. This is not the true principle: it is this; he who affirms either *what he does not know to be true*, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages.

But here is a contract: the plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.

The above-cited cases show that a *scienter* is not necessary in this case, although it was necessary in the case of *Haycraft v. Creasy* and

the cases of that class. In these cases, a party who had no interest was applied to for his opinion; if he gave an honest, although mistaken one, it was all that could be expected.

* * * * *

Rule discharged.

BAILEY v. BUSSING.

(28 Connecticut, 455.—1859.)

ACTION by executors of Aaron Turner to recover one-third of the amount of a judgment recovered against Turner, the defendant and one Whitlock, and paid in full by Turner, for an injury caused by the negligent management of a stage in which defendants were alleged to be jointly interested. Bussing was the driver of the stage, and the injury was caused by his negligence. Judgment for plaintiffs. Defendant moved for a new trial.

ELLSWORTH, J. This is an action of assumpsit, to compel a contribution for money paid on a judgment against three defendants, Whitlock, Aaron Turner the plaintiffs' testator, and Bussing the present defendant. That there was a judgment rendered by the superior court for Fairfield county at its February term in 1852, against Whitlock, Turner and Bussing, and that Turner was compelled to pay and did pay, on the execution, the whole amount of the judgment, or such a sum as was received in satisfaction of the judgment, is admitted or not denied. This evidence, it is said, would in law *prima facie* entitle the plaintiffs to recover one-third of the sum paid from the defendant, and that there must be such recovery unless there is something peculiar to the present case which saves it from the application of the principle ordinarily applicable to such cases.

If this judgment had been recovered on a joint contract or joint liability of any kind sounding in contract, the production of the judgment, and proof of payment by Turner of the whole sum, would of course show a good cause of action in the plaintiffs for the recovery from Bussing of one-third the amount paid. Is there anything on this record which, when taken in connection with the evidence received in the case, distinguishes this case from the one just supposed?

The defendant insists that that judgment was rendered in an action of tort, and that in that class of cases there is to be no contribution among wrong-doers; the maxim of law being as he claims, that among

tort-feasors there is no contribution. To meet this objection, the plaintiffs offered evidence, and we think with entire propriety, to prove that, while the maxim might be true as a general rule, the case on trial belonged to a class of cases to which it had no application, for that here there was no personal wrong, not even negligence in a culpable sense, on the part of Turner, and that he had been found guilty only by implication, or legal inference from a supposed relation of Bussing, the actual wrong-doer, through whose neglect the other two defendants had been subjected by the jury.

No objection was made to the reception of the evidence, and we think none could properly have been made. The court received it and found the fact to be as claimed by the plaintiffs, that Turner was not present, and had no participation in the negligent conduct of the driver of the stage which caused the injury to Mrs. Haight, notwithstanding that, under the particular charge of the court in that case, the jury found that Turner was, in a legal sense, implicated and liable, even though there was not any actual wrong on his part.

What then is this case? And what is the true doctrine of the law as to contribution, or, as it may be, full indemnity, where there has been no illegal act or conduct on the part of him who seeks for a contribution?

* * * * *

The reason assigned in the books for denying contribution among trespassers is that no right of action can be based on a violation of law, that is, where the act is known to be such or is apparently of that character. A guilty trespasser it is said can not be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If however he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or as the case may be a contribution, as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right, an assistant rendering aid to a sheriff in the execution of process, or common carriers, to whom is committed and who innocently carry away property which has been stolen from the owner. Indemnity, or contribution to the full amount, is allowable here, and it can be enforced by action if refused, whether the person seeking it has been subjected in case or assumpsit to the damages of which he complains. And since in many instances the person injured has an election to sue in case or assumpsit, it is not possible that the form of action in which the party seeking for indemnity or contribution has been subjected, should be the criterion of his right to call for it. One partner or one joint proprietor may do that which will subject all the rest in case or

assumpsit, as the fact may be, but there may be a right to contribution notwithstanding, and in some cases, if indeed the present is not one of them, a full indemnity may be justly demanded from the person doing the wrong, by the other partners whom he has involved in loss by his wrongful act. The form of action then is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrong doers is not to be applied. Indeed we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators carriers and the like.

One of the earliest cases where the maxim is recognized is *Merryweather v. Nixan*, 8 Term. R. 186, where the plaintiff was the active wrong doer. Having paid the whole damage, he sought for a contribution. It was denied him, and rightfully so, upon the strength of the maxim referred to. But even here, lest a wrong inference should be drawn from the decision, Lord KENYON, C. J., says: "This decision will not affect cases of indemnity where one man employed another to do an act not unlawful in itself." The earlier case of *Philips v. Biggs*, Hardr. 164, in which this point was raised, was never decided. In *Wooley v. Batte*, before Justice PARK, 2 Car. & P. 417, one stage proprietor had been sued alone in case for an injury to a passenger through the neglect of the coachman, and, having paid the damages, he brought assumpsit for a contribution, and recovered on the ground that in him there was no personal fault. In *Adamson v. Jarvis*, 4 Bing. 66, suit was brought for indemnity by an auctioneer against his employer, he having sold goods which did not belong to his employer, and for which he had been compelled to pay upon a judgment recovered against him by the owner, being himself innocent. The court held that he could recover. BEST, C. J., said: "From the inclination of the court in the case in Hardres and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nixan*, and from reason, justice and sound policy, the rule that wrong-doers can not have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." In *Betts v. Gibbins*, 2 Adol. & E. 57, Lord DENMAN, C. J., says: "The general rule is, that between wrong-doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself. If they were acting *bona fide*, I can not conceive what rule there can be to hinder the defendant from being liable for the risk." Again, speaking of *Battersey's Case*, Winche, 48, he says that it shows that there may be an indemnity

between wrong-doers, unless it appears that they have been jointly concerned in doing what the party complaining knew to be illegal. In Story on Partnership (section 220) the learned commentator says, speaking of the maxim that there is no contribution among wrong-doers, "but the rule is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the innocence and propriety of the act, and the tort is one by construction or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between the constructive wrong-doers, whether partners or not." The cases are all brought together in Chitty on Contracts (page 502), where the author most fully sustains by his own remarks the qualifications of the rule laid down by Lord DENMAN. I will here leave this topic, only repeating my remark that the maxim in question is scarcely worthy of being considered a general rule of law, for it is applicable only to a definite class of cases, and to that class the case before us does not belong.

* * * * *

We conclude therefore that the objections we have been considering ought not to defeat the right of the plaintiff to recover, and we do not advise a new trial. In this opinion the other judges concurred.

New trial not advised.

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(f) INDEMNITY.

TRUSTEES ETC. OF CANANDAIGUA V. FOSTER.

(81 Hun, 147.—1894.)

APPEAL from an order denying a motion for a new trial on the minutes of the court after verdict in favor of plaintiffs.

DWIGHT, P. J. One McSherry, in 1889, brought an action against the village of Canandaigua for injuries sustained by him in falling on a defective sidewalk, in front of premises of defendant, on one of the streets of that village. The plaintiffs gave the defendant notice to defend the action, and he undertook to do so. Judgment, however, went against the village, which the plaintiffs paid, and now bring their action over, to recover of the defendant the amount so paid.

The defect in the sidewalk was a loose grating, covering the opening into a vault beneath. The vault was excavated and the grating set by the defendant many years before, with the acquiescence and consent, actual or implied, of the village authorities. *Babbage v. Powers*, 130 N. Y. 281. It was therefore out of the question that the plaintiffs should recover over, against the defendant, for the original construction, good or bad, of the vault and grating. *Trustees of Geneva v. Brush Electric Co.*, 50 Hun, 581, affirmed 130 N. Y. 670; and so the court held at the circuit. But the defendant reconstructed the opening and reset the grating in the summer of 1888, and the evidence on the part of the plaintiffs tends to show that this work was done in an improper manner, and that, in consequence of it, the grating soon after came to be in an unsafe condition, and that the accident to McSherry resulted therefrom. This evidence presented the main question which was submitted to the jury, and properly submitted, as we think. There was no evidence of consent on the part of the village to the reconstruction, nor lapse of time from which acquiescence should be inferred. If, therefore, the reconstructed opening and grating were a nuisance, the defendant, and not the village, was primarily liable for injuries to third persons resulting therefrom. As we had occasion to say in the case of *Village of Geneva, supra*: "The general rule which denies indemnity or contribution to joint wrongdoers is elementary. The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases; *First*, where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant, acting within the scope of his employment; or, *second*, where both parties have been in fault, but not in the same fault, towards the person injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury." Illustrations of the second class were found in cases, like the present, "of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance; that of the former, the failure to remove it, in the exercise of its duty to care for the safety of the public streets. The first was a positive tort, and the efficient cause of the injury complained of; the latter, the negative tort of neglect to act upon notice, express or implied." The cases here cited of *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550, *Village of Seneca Falls v. Zalinski*, 8 Hun, 575, and *City of Rochester v. Montgomery*, 72 N. Y. 65, and many others of like character, are cases of the second class above described; and they clearly support the submission of this case to the jury, with the instruction, in effect, that if they should find that, in the

reconstruction of the grating, the defendant did the work improperly, and in such a manner as to make the use of the sidewalk dangerous, and that the accident in question resulted therefrom, then the plaintiffs might maintain their action over against the defendant.

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The order appealed from should be affirmed.
Order appealed from affirmed, with costs.

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